TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 208 40.

EDWARD E. O'BRIEN, APPELLANT,

vs.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FILED APRIL 26, 1895.
CERTIORARI AND RETURN FILED MAY 15, 1895.

(15,881.)

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(15,881.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 266.

EDWARD E. O'BRIEN, APPELLANT,

vs.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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1 United States Circuit Court of Appeals for the Second Circuit.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs, Libellants and Appellees,

versus

EDWARD E. O'BRIEN, Respondent and Appellant.

Statement.

The names of all the original parties are set forth in the above title. By the final decree, it was adjudged that the libellants Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs had no interest, and the libel as to them was dismissed.

This suit was commenced on July 20, 1887, on which day the above-named libellants filed their libel against the above-
2 named respondent in the district court of the United States for the southern district of New York. The respondent duly appeared in said cause, and on August 2d, filed stipulation for value in the sum of $10,000.

On August 4, 1887, respondent filed exceptions to the libel in that (1) it did not state the nature of the action; and (2) that it did not state a cause of action against the respondent. Said exceptions came on to be heard before the Hon. Addison Brown, judge of said district court, on the 10th day of April, 1888, who rendered his decision on the 6th day of June, 1888, and on the 27th day of June, 1888, an order was duly made and entered overruling the first and sustaining the second of said exceptions, and ordering that, unless said libel be amended, the respondent have a final decree against the libellants, dismissing their libel with costs. On July 28, 1888, libellants filed an amended libel, the amendment consisting in the addition to the fourth article of the libel of the allegation that the condition and character of the ship *Andrew Johnson* was such that she could not by repairs be made fit to carry her cargo to the port of destination, nor be fitted to carry any portion thereof forward except by making heavy repairs; the transshipment of 8,449 bags of cargo on the *Mary J. Leslie*, and that in place of transshipping the remaining portion of said cargo to other bottoms and forwarding the same to its destination, which would have been the proper course to pursue, the respondent, for his own advantage, and not for the advantage of the libellants, elected to carry forward the said remainder of the cargo, and to that end discharged and warehoused a large portion of said cargo and made extensive repairs to the ship. And further, in alleging in the sixth article the issue by the *Mary J. Leslie* of her bill of lading, a copy of which was annexed to such amended libel.

On September 27, 1888, respondent filed exceptions to said

amended libel in that (1) it did not state the nature of the
3 action; (2) that it did not state a cause of action against the respondent by reason of the absence of any averment of the performance of a condition precedent to the validity of any bottomry and respondentia, to wit, communication had by the master before execution thereof with the respective owners of the cargo; and (3) that it did not state a cause of action against the respondent.

Said exceptions came on to be heard before the said district judge on the 28th day of November, 1888, and on the 5th day of December, 1888, an order was made and entered overruling the first and second of said exceptions and sustaining the third exception, and ordering that unless the libel be further amended that the respondent have a final decree against the libellants dismissing the libel, with costs.

On January 4, 1889, libellants filed a second amended libel, the amendment consisting in the addition to the fifth article of an allegation that the respondent supplied funds to the master or caused funds to be supplied by Grace Brothers & Co., of Lima, Peru, to defray the expenses of repairs, &c., and an allegation that the libellants, not being fully advised of the circumstances and believing that the bond was properly and necessarily issued, assented; an amendment of the sixth article alleging that the libellants believed that they were in law bound to make payment of the bond to redeem their cargo; and the addition to the seventh article of an allegation that the ship *Andrew Johnson* was of the value exceeding $15,000 at the time in question. On January 28, 1889, respondent filed exceptions to said libel in that (1) it did not state the nature of said action; (2) that it was ambiguous and uncertain in averring in article 5th that the respondent supplied funds to the master or caused funds to be supplied by Grace Brothers & Co., and thereafter averring that Grace Brothers and Co. advanced said sum to
the master; (3) that it did not state a cause of action within
4 the admiralty and maritime jurisdiction of the court against respondent, and (4) that it did not state a cause of action against respondent.

On October 24, 1890, on motion of libellants, an order was made allowing the libellants to further amend their libel by adding to the sixth article thereof the following:

"The said loss of the said ship *Andrew Johnson* and her cargo on the said voyage from Callao to Hamburg was due to her collision with the British ship *Thirlmere*, and it appearing that said collision was due solely to the fault of those navigating the said ship *Thirlmere*, the respondent or his privies have, through appropriate legal proceedings in the courts of Great Britain, compelled the owners of the said ship *Thirlmere* to pay on account of the loss of the said ship *Andrew Johnson* and her freight the sum of £6,557 9s. 6d. and have collected and received the same," and on October 28, 1890, libellants filed their amended libel in conformity with said order.

On June 22, 1891, respondent filed his exceptions and answer to said amended libel.

The cause was tried before Hon. Addison Brown, district judge, on November 22, 1893, who rendered his decision on February 5, 1894, in favor of libellants. The interlocutory decree, with an order of reference to Wm. A. Walker, Esq., special commissioner, to ascertain and report the amount the libellants were entitled to recover, was entered on April 13, 1894.

On April 10, 1894, the respondent applied to the court for leave to amend his answer by setting up additional defences of laches on the part of the libellants and *res adjudicata*. On the 19th day of April, 1894, an order was made and entered denying said motion.

The commissioner's report was filed on June 5, 1894, whereby he reported due the libellants the principal sum of $6,091.73.

5 On June 23, 1894, George A. Black was substituted as proctor for respondent.

The final decree herein was entered on July 16, 1894.

Respondent's notice of appeal was filed on July 17, 1894.

United States District Court, Southern District of New York.

BRICE ALLAN MILLER *et al.*
vs.
EDWARD E. O'BRIEN.
} Exceptions to Amended Libel.

And now comes the respondent herein, Edward E. O'Brien, by Sidney Chubb, his proctor, and excepts to the amended libel and complaint of the libellants herein as follows:

First Exception.

He excepts specially to the said amended libel and complaint for that the same does not state in the first folio thereof the nature of the said action.

Second Exception.

He excepts specially to the said amended libel and complaint for that it does not state a cause of action against this respondent by reason of the absence therefrom of any averment of the performance of a condition precedent to the validity of any instrument of bottomry and respondentia, to wit, communication had by the master before execution thereof with the respective owners of the vessel and of the cargo alleged to be hypothecated thereby.

6 *Third Exception.*

He excepts generally to the said amended libel and complaint, on the merits, for that it does not state a cause of action against this respondent.

Dated New York, August 3, 1887.

SIDNEY CHUBB,
Proctor for Respondent.

(Endorsed:) Exceptions to amended libel. Filed Sept. 27, 1888.

At a stated term of the district court for the southern district of New York, held at the court-rooms, on the 28th day of November, 1888.

Present: Honorable Addison Brown, district judge.

BRICE ALLAN MILLER, THOMAS DENISON COMBER, JOHN MANLY Lowe, John Isidaile Smaill, Alfred Naylor, Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs, Libellants,

vs.

EDWARD E. O'BRIEN, Respondent.

The respondent having filed exceptions to the amended libel filed by the libellants above named, and the said exceptions having this day duly come on to be heard, now, after hearing Sidney Chubb, Esq., in behalf of the respondent in support of said
7 exceptions, and Wilhelmus Mynderse, Esq., in behalf of the libellant- in opposition thereto, and due deliberation being had, it is now, on motion of Sidney Chubb, proctor for respondent—

Ordered, that the first and second exceptions of the respondent be and the same hereby *is* overruled, and that the third of the said exceptions of the respondent be and the same is hereby sustained on the merits, and on like motion it is further—

Ordered, that unless the respondent's taxed costs be paid and the libel of the said libellants be further amended within twenty days after the service of this order upon the proctors for the libellants, that the said respondent, Edward E. O'Brien, have a final decree against the said libellants dismissing their said libels with costs.

ADDISON BROWN.

(Endorsed:) Order. Filed Dec. 5, 1888.

To the Honorable Addison Brown, district judge of the United States for the southern district of New York:

The amended libel and complaint of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs against Edward E. O'Brien, in a cause of action civil and maritime, of the kind and nature hereinafter more fully described, alleges and articulately propounds as follows, to wit:

First. At all the times hereinafter mentioned the libellants, Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, were merchants, doing business in Valparaiso, Chili, under the firm name of Gibbs & Company; and the libellants, Henry Hucks Gibbs, Augustus Sillem,
8 Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs, were merchants and copartners, doing business in the city of London, England, under the firm name of Antony Gibbs & Sons.

Second. At all the times hereinafter mentioned up to the time of the loss of the ship *Andrew Johnson*, the respondent, Edward E. O'Brien, of Thomaston, Maine, was the sole owner of the said ship.

Third. In the months of June and July, 1884, the libellants, composing the said firm of Gibbs & Company, at the instance and request of the respondent and his agents, shipped on board the said ship *Andrew Johnson*, at Iquique bay, ten thousand three hundred and ninety-nine (10,399) bags of nitrate of soda, and on board the same vessel, at the port of Caleta Buena, nine thousand five hundred and forty-four (9,544) bags of nitrate of soda, to be transported in said vessel to Hamburg, Germany, and there to be delivered to the order of said firm of Messrs. Antony Gibbs & Sons, of London, and the respondent engaged to so transport and deliver the said cargo.

Fourth. On the 15th day of July, 1884, the said ship, with all of the aforesaid cargo on board, sailed from Caleta Buena for Hamburg, but she was at the time, as was known or should have been known to the respondent, unseaworthy and unfit for the voyage upon which she was bound, and thereafter, by reason of being in such unseaworthy and unfit condition, she began to leak badly and fell into distress, and was compelled to and did seek a harbor of refuge and put into the port of Callao, Peru, as such harbor of refuge, where she arrived on the 4th day of August, 1884, making much water. The condition and character of the said ship was such that she could not by repairs be made fit to carry her said cargo forward from Callao to its port of destination, nor
9 could she be fitted to carry any portion thereof forward except by making heavy repairs; and thereupon the respondent transshipped eight thousand four hundred and forty-nine bags of the said cargo on board the British bark *Mary J. Leslie*, and in place of transshipping the remaining portion of his said cargo to other bottoms and forwarding the same to its destination, which would have been a proper course to pursue, did, for his own advantage and not for the advantage of the libellants, elect and determine to carry forward the said remaining portion of his said cargo to its destination by the *Andrew Johnson*, and to that end discharged and warehoused a large portion of his said cargo, and made extensive repairs to his said ship.

Fifth. Having thus incurred large expenses in making the necessary repairs to his vessel and in supplying her to continue her voyage, and in transshipping the said portion of the cargo to the *Mary J. Leslie*, and in other matters pertaining to the seeking of the harbor of refuge, repairing his said vessel and preparing to carry and forward his cargo, the respondent, as the libellants are now informed and believe, supplied funds to the master, or caused funds to be so supplied by Messrs. Grace Bros. & Co., merchants of Lima, Peru, to defray the said expenses so incurred and so to continue the voyage and carry or forward the cargo, which expenses amounted in all to thirteen thousand two hundred and thirty-seven and seventy-two one-hundredths (13,237.72) Peruvian soles, equivalent to two

thousand two hundred and twelve pounds five shillings and nine pence (£2,212, 5s. 9d.), British sterling, and thereupon the said master of the *Andrew Johnson* did, at the instance of the respondent, and for his benefit, execute a bottomry and respondentia bond on the 15th day of September, 1884, to the said Messrs. Grace Brothers & Co., hypothecating to them, or their order, the said ship *Andrew Johnson*, her boats and apparel and cargo, including the
10 eight thousand four hundred and forty-nine bags of cargo transferred to the *Mary J. Leslie* as aforesaid, and her freight, in the sum of two thousand five hundred and ninety-nine pounds eight shillings and nine pence (£2,599, 8s. 9d.) British sterling, being the amount of said costs and expenses so incurred as aforesaid, together with maritime interest or premium thereon at the rate of seventeen and one-half (17½) per cent.; a copy of which bond or obligation is hereto annexed marked "A," and made a part of this amended libel. And thereupon the said firm of Grace Brothers & Co. advanced, as aforesaid, to the said master the said sum of two thousand two hundred and twelve pounds five shillings and nine pence (£2,212, 5s. 9d.), British sterling, in manner aforesaid, which sum was applied by the said master in paying and defraying the costs and expenses so incurred as aforesaid. The libellants, not being fully advised of the circumstances, and believing that the said bond was properly and necessarily issued, assented.

Sixth. Thereafter, and on the 25th day of September, 1884, the said bark *Mary J. Leslie* issued her bill of lading for the said eight thousand four hundred and forty-nine bags of nitrate of soda transshipped to her as aforesaid, engaging to transport the said nitrate of soda to Hamburg, Germany, and there deliver the same pursuant to the terms and conditions of said bill of lading, a true copy of which bill of lading, with its marginal notes and endorsements is hereto annexed, marked "B," and made a part of this amended libel; and in due course the said bark sailed from Callao and arrived at Hamburg, Germany, with said nitrate of soda on board. The master of the said ship *Andrew Johnson* and the respondent, notwithstanding the premises, then failed and neglected to pay the said bond, and the said ship *Andrew Johnson* and the remaining cargo and freight having become a total loss on their voy-
11 age from Callao to Hamburg, the holders of said bottomry and respondentia bond did demand of the libellants, who were the owners of the said eight thousand four hundred and forty-nine bags of nitrate of soda on board the *Mary J. Leslie*, payment of the full amount of said bottomry and respondentia bond (£2,599 8s. 9d.), which was a liability and obligation of the respondent, under the penalty of the condemnation of their said cargo, which payment the libellants, being still in the belief that the said bond was properly and necessarily issued, did make to the holders of said bond, on or about the 17th day of March, 1885, as they believed they were bound in law to do to redeem their said cargo from the said hypothecation. And in no other way could the libellants get delivery and possession of their said cargo.

The said loss of the said ship *Andrew Johnson* and her cargo on

the said voyage from Callao to Hamburg was due to a collision with the British ship *Thirlmere;* and it appearing that said collision was due solely to the fault of those navigating the said ship *Thirlmere*, the respondent or his privies have, through appropriate legal proceedings in the courts of Great Britain, compelled the owners of said ship *Thirlmere* to pay, on account of the loss of said ship *Andrew Johnson* and her freight, the sum of £6,557 9s. 6d., and have collected and received the same.

Seventh. The libellants allege that of the charges and expenses incurred at Callao as aforesaid, and which the libellants have paid as aforesaid, the sum of one thousand three hundred and seventy-six pounds and seven shillings (£1,376 7s.), together with seventeen and one-half (17½) per cent. maritime interest thereon, amounting in all to the sum of one thousand six hundred and seventeen pounds four shillings and three pence (£1,617 4s. 3d.), British sterling, were charges specially made and incurred by and for the benefit of the said ship *Andrew Johnson* and her freight and the
12 owner thereof, and at his instance and request; that the said ship was of a value exceeding fifteen thousand dollars at the time the said charges were made.

Eighth. The libellants have made demand upon the respondents for the payment to them of the said sum of one thousand six hundred and seventeen pounds four shillings and three pence (£1,617 4s. 3d.), British sterling, equivalent in United States money to seven thousand eight hundred and seventy $\frac{16}{100}$ dollars ($7,870.16), with interest thereon from March 17, 1885, but the said respondent has refused to pay the same, or any part thereof.

Ninth. The said Edward E. O'Brien, respondent herein, has appeared in this action by a proctor, and has given security under the original libel.

Tenth. All and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore, the libellants pray the judgment and decree of this court in their favor against the said respondent Edward E. O'Brien, and that the appearance and security given by the said respondent under the original libel stand as an appearance and security under this amended libel according to the course and practice of this court.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

CITY AND COUNTY OF NEW YORK, } ss:
Southern District of New York, }

Willhelmus Mynderse, being duly sworn, says: That he is one of the firm of Butler, Stillman & Hubbard, proctors for the libellants named in the foregoing amended libel, and that he has read the said amended libel and knows the contents thereof, and the same is true according to his best information and belief. Deponent
13 further says that his belief is based upon information given to him by the libellants in correspondence with his said firm through solicitors of London, England, and from an inspection

and examination of the alleged original bottomry and respondentia bond and alleged original shipping documents, and an adjustment and statement made by qualified and professional accountants of the alleged costs and expenses alleged to have been incurred in Callao, and that he believes his said information to be true. Deponent further says that the reason this verification is made by deponent and not by one of the libellants is that the libellants are in Valparaiso, Chili, or in London, England, as deponent is informed and believes, and no one of them is within this district or within the United States.

WILHELMUS MYNDERSE.

Sworn to before me this 27th day of October, 1890.

GEORGE CROMWELL,
[L. S.] *Notary Public, Richmond County.*

Certificate filed in N. Y. Co.

A.

Bottomry and Respondentia Bond.

Know all men by these presents, that I, James H. Killeran, master mariner and commander of the ship or vessel called the *Andrew Johnson*, of Thomaston, Maine, of the measurement of nineteen hundred and thirty-eight tons or thereabouts, now lying in the port of Callao, am held and firmly bound to Messrs. Grace Brothers & Co., carrying on business at Lima and Callao under the firm of Grace Brothers and Company, in the penal sum of thirteen thousand two hundred and thirty-seven Peruvian silver soles 14 $\frac{72}{100}$, at forty pence to the sole, equal to two thousand two hundred and twelve pounds 5s. 9d. of good and lawful money of Great Britain, to be paid to the said Grace Brothers & Co., or any of them, or to their or any of their order, certain attorney, executors, administrators or assigns, or to such person or persons as they or any of them shall appoint by endorsement hereon in the name of their firm of Grace Brothers & Co. to receive the same.

For which payment, to be well and faithfully made, I bind myself, my heirs, executors or administrators, and also the hull, boats, tackle, apparel and furniture of the said vessel and her cargo of nitrate of soda, including about twelve hundred tons of nitrate of soda, transhipped on board the British bark *Mary J. Leslie*, of Liverpool, N. S., of 815 tons register, and of which W. S. MacLeod is now master, and the freight to be earned and become payable in respect thereof, firmly by these presents, sealed with my seal. Dated this fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas, the said vessel lately sailed from Caleta Buena, laden with a cargo of nitrate of soda, bound therewith to Hamburg in Germany, and during the prosecution of the said voyage sprang a leak, whereby she took in water at sundry times to such an extent

that it was deemed expedient by the said master, for the safety of the vessel and the benefit of all concerned, to bear up for Callao, which was accordingly done, and on arrival at Callao aforesaid the vessel was duly surveyed by competent surveyors and certain repairs were recommended to be done to enable the said vessel to continue the voyage with safety, and also to transship to another vessel about twelve hundred tons of the cargo laden on board the aforesaid *Andrew Johnson* in order to enable her to proceed on her voyage with perfect safety.

And whereas, all necessary repairs and supplies have been
15 made to the said vessel, and the said portion of cargo transshipped to the *Mary J. Leslie* to enable her to prosecute her said voyage, and she is now in a seaworthy condition, and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his said vessel which he is totally unable to defray and make good, save and except upon the security of the bottom of his said vessel and her cargo and freight, hath been necessitated to raise the sum of thirteen thousand two hundred and seventy-three Peruvian soles, $\frac{7}{10}\frac{2}{0}$ silver, or its equivalent in British sterling, for the payment of the debts incurred as aforesaid, and to enable the said vessel to proceed to sea on the said intended voyage, and which sum the said master has been unable to obtain on his own credit or that of the owners of the said vessel, or in any other way than by bottomry and hypothecation of the said vessel, her boats, apparel, cargo and freight.

And whereas, the said Grace Brothers & Co. have, at the request of the above-bounden James H. Killeran, agree- to lend and advance to him the sum of thirteen thousand two hundred and seventy-three soles $\frac{7}{10}\frac{2}{0}$ silver, or its equivalent, at forty pence as aforesaid, in British sterling, for the purposes aforesaid, upon his executing this present bond or obligation and hypothecation of the said vessel, her boats and apparel, and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and the freight to be earned and become payable in respect of the said voyage, and the said Grace Brothers & Co. are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said vessel *Andrew Johnson*, her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid, and the freight
to be earned and become payable as aforesaid and for secur-
16 ing the repayment of the said sum of thirteen thousand two hundred and seventy-three Peruvian soles $\frac{7}{10}\frac{2}{0}$ silver, or its equivalent in British sterling, as aforesaid, the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the said vessel, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Brothers & Co., their executors, administrators and assigns.

Now, the condition of this obligation is such, that if the said

vessel shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Brothers & Co., or any of them, their or any of their order, attorneys or attorney, executors, administrators or assigns, or unto such person or persons as they or any of them shall appoint by endorsement under their or his hand or hands in the name of their or his firm of Grace Brothers & Co., or otherwise, upon this present obligation the sum of two thousand two hundred and twelve pounds 5s. 9d. British sterling money, being the principal money of this obligation, and the further sum of three hundred and eighty-seven pounds three shillings of like money for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds 10 per centum, making together the sum of two thousand five hundred and ninety-nine pounds 8s. 9d. British sterling, and also do and shall on demand well and truly pay or cause to be paid
17 unto the said Grace Brothers & Co., or any of them, or to their or any of their order, attorneys, endorsers, executors, administrators or assigns, all such costs, charges and expenses as they or any of them shall or may have incurred, sustained or be put to in or about the recovery of the aforesaid principal money and premium, or any part thereof, or otherwise howsoever in the premises.

Or if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea or navigation, or any other casualty, shall unavoidably happen to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue.

In testimony whereof, the said James H. Killeran hath, to these present-, and to a duplicate and triplicate thereof, set his hand and seal after careful reading, in the presence of the undersigned witnesses, the day and year first before written.

J. H. KILLERAN, *Master.*

Signed in the presence of—

G. LESTER.
H. M. BROMLEY.

CONSULATE OF THE UNITED STATES,
[SEAL.] CALLAO, PERU, 15 *Sep.*, 1884.

I, the undersigned, consul of the United States of America for Callao, Peru, and the dependencies thereof, do hereby certify that J. H. Killeran, master of the American ship *Andrew Johnson*, of Thomaston, Maine, the party to the hereunto-attached bottomry bond, personally came before me, and executed the said bond in my

presence, and in the presence of the witnesses thereunto, and
18 acknowledged the same to be his free act and deed for the purposes therein mentioned.

Witness my hand and the official seal of this consulate,
[SEAL.] this the fifteenth day of September, in the year of our Lord one thousand eight hundred and eighty-four.

H. M. BRENT,
U. S. Consul.

B.

Shipped in good order and conditioned by J. H. Killeran, capt'n of Amer. ship *Andrew Johnson*, in and upon the good ship or vessel called the *Mary J. Leslie*, whereof W. L. McLeod is master for this present voyage, and now laying at Callao and bound for Hamburg direct, eight thousand four hundred and forty-nine bags nitrate of soda, per margin, and are to be delivered in the like good order and conditioned at the aforesaid port of Hamburg (all and every the dangers and accidents of the seas and navigation of whatever nature and kind excepted); unto Messrs. Anthony Gibbs & Sons of London, or to their assigns, freight as per margin, for the said nitrate, and all other conditions of charter-party of the Amer. ship *Andrew Johnson*, dated in Valparaiso, 5th April, 1884.

8,449 bags nitrate of soda at the freight of £1,650 (one thousand six hundred and fifty) pounds sterling in full.—W. L. McLeod.

Weight & contents & quality unknown; all on board to be delivered. Not responsible for broken bags. —W. L. McLeod.

In witness whereof, the master or purser of the said ship or vessel hath affirmed to five bills of
19 lading all of this tenor and date, this second of which being accomplished the rest to stand void.

Dated in Callao, this 25th day of September, 1884.

W. L. MACLEOD.

(Endorsement.)

The 8,449 bags of nitrate of soda as per this bill of lading are included in and jointly responsible with the nitrate of soda specified in the bottomry and respondentia bond given to Messrs. Grace Bros. & Co. as security for the payment of the Amer. ship *Andrew Johnson's* disbursements in Callao.

Callao, 25th Sept., 1884.

W. L. McLEOD.

(Endorsed:) Third amended libel. Filed Oct. 28, 1890.

To the Honorable Addison Brown, judge of the district court of the United States within and for the southern district of New York:

The exceptions and answer of Edward E. O'Brien, respondent herein, to the third amended libel and complaint of Brice Alan

Miller *et al.*, libellants herein, articulately propounds and alleges as follows:

First. The respondent excepts specially to the said libel and complaint for that the same does not state in the first article thereof the nature of the said action as prescribed by the twenty-
20 third admiralty rule of the Supreme Court of the United States.

Second. This respondent excepts generally to the said amended libel and complaint on the merits, for that it does not state a cause of action against this respondent.

Third. This respondent excepts to the said amended libel and complaint for that the said libel and complaint does not state any cause of admiralty and maritime jurisdiction.

Fourth. And further answering herein, and without waiving in any way the benefit of the foregoing exceptions, and each of them, but on the contrary insisting thereon, this respondent answers the said libel and complaint as follows:

Fifth. This respondent has no knowledge as to the matters alleged in article first of said libel and complaint, and leaves the libellants to make such proof thereof as they may be advised.

Sixth. This respondent admits the matters alleged in article second of said libel and complaint.

Seventh. This respondent admits the matters alleged in article third of said libel and complaint.

Eighth. This respondent admits the matters alleged in article fourth of said libel and complaint, except the allegations touching the unseaworthiness and unfitness of his said ship *Andrew Johnson*, and the effects thereof, and touching the transshipment of cargo by respondent and the reasons therefor, and the proper course to be pursued in respect thereto, all of which this respondent denies.

Ninth. This respondent denies the matters alleged in article
21 fifth of said libel and complaint, except that he admits that large expenses were incurred by her master in making necessary repairs to his said ship, and in supplying her and in transshipping the said portion of her cargo, which expenses amounted to 13,237.72 Peruvian soles. This respondent also admits that the master of his said ship borrowed from Messrs. Grace Brothers & Co., upon credit of the instrument of bottomry and respondents therein set forth, the sum of £2,212 5s. 9d. British sterling, which sum was supplied by said master to paying and defraying the costs and expenses incurred at the said port of refuge.

Tenth. This respondent denies the matters alleged in article sixth of said libel and complaint, except that he admits the transshipment of a portion of said cargo on board the bark *Mary J. Leslie*, and the arrival of the said bark with the said cargo at Hamburg, Germany.

This respondent also admits that the master of the said ship *Andrew Johnson* and this respondent did not pay the said bond, and that the said ship *Andrew Johnson* and the remaining cargo and freight become a total loss by perils of the seas on the voyage from Callao to Hamburg.

This respondent admits that the owners of the ship *Thirlmere* having taken appropriate proceedings under the statutes of the United Kingdom of Great Britain and Ireland, obtained a decree limiting their liability for said collision to a certain sum, which they thereupon paid into court, and which said sum was distributed between the libellants and the respondent herein, and other parties and their attorneys, in part satisfaction of the damages by each of them sustained by reason of said collision; but this respondent denies that he received the said sum of £6,557 9s. 6d., and avers that the amount received by him was much less than said sum.

Eleventh. This respondent has no knowledge as to the
22 matters alleged in article seven of said libel and complaint, and leaves libellants to make such proof thereof as they may be advised.

Twelfth. This respondent admits the matters alleged in article eighth of said libel and complaint.

Thirteenth. This respondent admits the matters alleged in article ninth of said libel and complaint.

Fourteenth. This respondent denies the matters alleged in article tenth of said libel and complaint.

SIDNEY CHUBB,
Proctor for Respondent, 50 *Wall St.*, *New York*, *N. Y.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Sidney Chubb, being duly sworn, says: That he is the proctor for the respondent herein; that he has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

Deponent further says that the reason why this verification is made by deponent and not by the respondent, is that the respondent is not a resident of this State nor of this district, and is not within this State nor district, nor within one hundred miles of any part of this district.

SIDNEY CHUBB.

Sworn to before me this 22d day of June, 1891.

EDWIN B. WOODS,
Notary Public, Kings Co.

[SEAL.]

Certificate filed in N. Y. Co.

(Endorsed:) Exceptions and answer. Filed June 22, 1891.

23 United States District Court, Southern District of New York.

BRICE ALAN MILLER *et al.*
vs.
EDWARD O'BRIEN.

Before Hon. Addison Brown, judge.

NEW YORK, *November* 22, 1893.

Appearances: Messrs. Butler, Stillman & Hubbard (Mr. Mynderse), for libellants; Sidney Chubb, Esq., for claimant.

The claims of the libel are stated.

Mr. Chubb stated the exceptions and answer to the third amended libel

The COURT: I overrule the first and third exceptions. As to the second, I hold that that involves the merits of the whole controversy, and I will decide that when the whole evidence is in.

Mr. CHUBB: I take exception to both your honor's rulings.

I now move to amend my answer by setting up two separate and additional defenses:

First, to as much of the libellant's claim as arises out of the limited-liability proceedings in the English court as to the *Thirlmere*; the defense of laches on the part of the libellant in not sooner bringing that matter before the court.

24 Also as to the same portion of his claim, the defense *res judicata*, because passed on by the English court.

The COURT: I don't think that I ought to allow a plea of laches now by way of amendment to your answer. I deny that.

Mr. CHUBB: I except to that ruling.

The COURT: I overrule the motion to amend as to *res judicata*, there having been no notice of any such motion.

Mr. CHUBB: I except to your honor's ruling.

Mr. MYNDERSE: I now offer in evidence the depositions of the following witnesses:

James H. Killeran, master of the *Andrew Johnson*, taken in New York, August 5, 1892.

Edward E. O'Brien, respondent, examined at his home in Maine, April 18, 1892.

I have also a commission executed in London under which the following depositions were taken:

Augustus Sillen, one of the consignees of the cargo in London, Gibson & Co.

William Richards.

Mr. CHUBB: I object to the testimony of Mr. Richards because he is an average-adjuster who, upon certain documents he obtained in the usual course, made up a *pro forma* statement of adjustment according to the laws of London, while the loading of the cargo took place in one of the ports of South America, and the port of destination was Hamburg, in Germany. The testimony is irrelevant, incompetent and immaterial.

The COURT: If the deposition contained testimony as to any

facts competent to be taken into consideration here, and if it has been taken in the proper way, then it is entitled to be read to that extent. Any adjustment as a mere adjustment, made by the law of London, would not be binding here. If that deposition has
25 reference to the adjustment only and there is no testimony as to the facts of the witness' own knowledge, I exclude it here, without prejudice to the matter coming before a commissioner in case there should be a decree for the libellant hereafter. I do not rule upon what it may be worth as to the adjustment of the average, because I shall not hear that question now. When it comes before him he can determine whether there are any such differences to affect that adjustment, if so it must be excluded.

Mr. CHUBB: I except.

Mr. MYNDERSE: I have a commission which was executed in Hamburg, under which we took the depositions of Octavio Rudolph Schroeder, doctor of laws; Dr. Hermann Stockfleth, notary public; Hugo Wirtz, agent of the consignees of the cargo; Dr. Gustav Edward Nolte, doctor of laws; Dr. I. Wolffson, doctor of laws; Dr. Otto Stammann.

(Libellants rest.)

Mr. CHUBB: I offer in evidence the second deposition of the master of the *Andrew Johnson*, James H. Killeran, taken by the libellants pursuant to notice, in the city of Buffalo, in this State, on the 23d day of March, 1893.

Mr. MYNDERSE: I object to the following portion of the deposition as incompetent and immaterial:

"Q. And in your opinion what was her value at the time she entered the harbor of Callao, her port of refuge, before making repairs? A. In my opinion, the ship was worth just as much when she entered the port of Callao as she was at the time of the collision. Most of our expense was incurred in transshipping cargo, and the repairs made at Callao were not of a permanent nature."

The objection is overruled.

(Testimony closed.)

26 *Deposition of James H. Killeran, Taken at New York, August 5, 1892, on Behalf of the Libellants, Pursuant to Notice.*

Present: Butler, Stillman & Hubbard (Mr. Mynderse) for libellants; Mr. Sidney Chubb for respondent.

JAMES H. KILLERAN, being duly sworn and examined as a witness for the libellants, testifies:

By Mr. MYNDERSE:

Q. Where do you reside?

A. Buffalo, New York.

Q. Your full name is James H. Killeran?

A. Yes, sir.

Q. Were you ever master of the *Andrew Johnson*?
A. Yes, sir.
Q. She hailed from where?
A. Thomaston, Maine.
Q. Were you in command of her in the year 1884?
A. Yes, sir.
Q. Do you recall taking a cargo of nitrate of soda on board at Caleto Buena and at Iquique bay in June and July, 1884?
A. Yes, sir.
Q. Shipped by Gibbs & Sons?
A. I don't remember the shippers.
Q. (Handing witness papers.) Are these the bills of lading of the cargo?
A. Yes, sir.

The bills are offered in evidence and marked respectively Exhibits 1 and 2, August 5, 1892.

Q. Was the vessel under charter?
A. Yes, sir.
Q. (Handing witness paper.) Is this the charter-party?
A. Well, I couldn't swear to it.
Q. That appears to be the original charter-party?
A. Yes, sir.

The charter-party is offered in evidence and marked Exhibit No. 3, August 5, 1892.

Q. When you left Caleta you were bound for what port of destination?
A. Bound to Hamburg.
Q. Did you meet with any disaster, and if so what was the
27 character of it?
A. I met with heavy weather.
Q. Did that occasion your seeking a port of refuge?
A. Yes, sir.
Q. Where did you go?
A. To Callao.
Q. Did you consider it prudent after your experience in this heavy weather to continue your voyage without seeking a port of refuge and for repairs?
A. Certainly not.
Q. After arriving in Callao did you make repairs?
A. Yes, sir.
Q. Do you remember whether any surveys were called upon your vessel?
A. There were.
Q. Do you remember how many there were?
A. No, I don't.
Q. Do you remember generally what the first survey recommended?
A. No, I don't think I could remember it.

Q. (Handing witness paper.) Does that appear to be a copy of it?

A. Yes, sir.

Copy of the survey is offered in evidence and marked Exhibit No. 4, August 5, 1892.

Q. (Handing witness another paper.) Does that appear to be a copy of the second survey?

A. Well, I can't swear that this is a copy of it, but I should judge it was.

Copy of second survey is offered in evidence and marked Exhibit No. 5, August 5, 1892.

Q. (Handing witness another paper.) Look at this and see whether it is the third survey?

A. It is simply a confirmation of the facts that repairs were made.

The paper is offered in evidence and marked Exhibit No. 6, August 5, 1892.

Q. Generally, were these proceedings in Callao in accord with the recommendations of these surveys in the matter of repairing your vessel and in transshipping a portion of your cargo?

A. Yes.

Q. You did transship some of your cargo to what vessel?

A. *Mary J. Leslie.*

28 Q. (Handing witness paper.) Under that bill of lading?

A. Yes, sir.

Q. For Hamburg?

A. For Hamburg, yes.

Bill of lading is offered in evidence and marked Exhibit No. 7, August 5, 1892.

It is annexed to amended libel.

Q. How did you meet the expenses that you incurred in Callao?

A. How did I meet them?

Q. Yes; how did you raise funds for them?

A. Bottomry bond.

Q. Bottomry and respondentia bond?

A. Yes, sir.

Q. (Handing witness paper.) Is this the bond?

A. This is the original bond, is it? It is my signature, I know; yes, sir.

Bond is offered in evidence and marked Exhibit No. 8, August 5, 1892.

It is annexed to amended libel.

Q. Who were the ship's agents in Callao other than yourself?

A. Grace Brothers or Grace & Co. I don't remember just the style of the firm.

Q. (Handing witness papers.) Will you look at this bunch of

papers and state whether these constitute the vouchers for the expenses incurred by you in Callao for the paying of which the bottomry and respondentia bond was given.

A. They appear to be; yes.

Vouchers for repairs and expenses aggregating the amount of the bond less the maritime premium, are offered in evidence and are set forth in Commissioner Walker's report herewith transmitted.

Q. After making these repairs, you left Callao with part of your cargo, bound for Hamburg? Did you reach it?

A. No.

Q. What became of the *Andrew Johnson?*

A. Run into and sunk.

Q. By the ship *Thirlmere?*

A. Yes, sir.

Q. Sunk in mid-ocean?

A. Yes, sir.

29 EXHIBIT No. 1.

Shipped in good order and well conditioned by Gibbs & Co. in and upon the good ship called the *Andrew Johnson*, whereof is master for this present voyage J. H. Killeran, and now riding at anchor in the Iquique bay and bound for Hamburg direct, ten thousand three hundred and ninety-nine bags nitrate of soda, weighing thirty-one thousand nine hundred and fifty-eight quintals net Spanish weight, and are to be delivered in the like good order and well conditioned at the aforesaid port of Hamburg (the act of God, the Queen's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted) unto Messrs. Anty, Gibbs & Sons, London, or to their assigns, freight for the said goods and all other conditions as per charter-party dated in Valparaiso 5th April, 1884.

In witness whereof the master or purser of the said ship hath affirmed to five bills of lading all of this tenor and date, one of which five bills being accomplished the other four to stand void.

Dated in Iquique, 11th June, 1884.

J. H. KILLERAN.

(In margin.)

10,399 bags nitrate of soda:

Wgt., qtls	32,280.81 gross.
Tare, 1 %	322.81
Net qtls	31,958

Weight, contents and quality unknown. All on board to be delivered. Not responsible for broken bags.

30 Exhibit 2 is in same form as Exhibit 1. It is dated Caleta Buena, 8th July, 1884, and acknowledges shipment by Gibbs

& Co. on ship *Andrew Johnson*, now lying at anchor in the port at Caleta Buena and bound for Hamburg direct, nine thousand five hundred and forty-four bags nitrate of soda, weighing twenty-six thousand nine hundred and twenty-nine quintals ten pounds, net Spanish weight.

The charter-party (Exhibit 3) is dated Valparaiso, April 5, 1884, between Gibbs & Co., of Valparaiso, and Grace Bros. & Co., acting as agents for the owners of the ship *Andrew Johnson*, then lying at Coquimbo, and provides:

That the ship being tight, staunch and strong, well and sufficiently manned, stored and victualled, and in every respect fit to perform the voyage, shall with all convenient speed proceed in ballast to Iquique where and or at Caleta charterers agree to ship and masters to receive a full cargo of nitrate of soda in bags. That vessel shall not load more than 61,600 quintals Spanish weight. Cargo to be placed alongside of vessel's boats in bags, at shippers' expense. Bills of lading to be signed by master, "weight and quality unknown, all on board to be delivered" at such rate of freight as charterers may direct without prejudice to charter-party but at not less rate than stipulated therein. After the dispatch of vessel, loaded, should she put into any port of distress. She shall be consigned to charterers or their agent. After receiving on board said cargo the vessel shall proceed with all convenient speed to any safe port in the United Kingdom or on the continent between Havre and Hamburg, both included, as ordered, and there according to bills of lading and charter-party deliver the whole of her cargo which is to be discharged and taken from alongside in accordance with the customs of the port. Restraints of princes and rulers, earthquakes and inundations, political disturbances or impediments, fire, pirates and enemies, the dangers of the seas and navigation, from the signing of the charter-party till the conclusion of the voyage always mutually excepted. Charterers agree to pay for freight of said vessel on a true and right delivery of the cargo in port of discharge according to the charter-party and bills of lading for each, and every ton of twenty hundredweight gross, avoirdupois, English, at the rate of thirty-seven shillings and sixpence sterling if ordered to Hamburg direct, to be paid one-third in cash on arrival at the printed rate of exchange for short bills on London and the remainder on delivery in cash at the printed rate of exchange for three months' bills on London. Charterers' liability to cease on completion of loading. Owners to have full lien on cargo for freight, dead freight and demurrage.

31

EXHIBIT No. 4, August 5, 1892.

At the request of H. M. Brent, Esqre., United States consul, Callao, we the undersigned, proceeded on board the American ship *Andrew Johnson*, 1,938 tons register, J. H. Killeran, master, at present lying in Callao bay to examine said vessel, and to ascertain what would be required to be done, she having put into this port in a leaky

condition, and after a careful and conscientious examination, have to report as follows:

That we have inspected minutely all available parts of the interior, and find that the vessel has a very good appearance, beams and knees in good condition, showing no signs of working or having moved. We noted, however, in the centre of the vessel more especially that water had been entering in considerable quantities from the top side.

It is to be remarked that the cargo is very well stowed and carefully distributed in the various parts.

32 Examining the exterior of the vessel we found various butts and seams at water's edge to be very soft.

We sounded the pumps at 2.30 p. m. when we found 25 inches of water in the well. One hour later, 25½ inches were shown.

Generally speaking, she presents a good appearance, well found in spars and sails, the upper deck appears to be nearly new, so that considering the (comparatively speaking) little water made now that the vessel is lying in port,

We consider it necessary she be lightened until at least the two upper sheets of metal are out of water for further examination.

And we declare we have conducted this survey in a conscientious and careful manner.

In witness whereof, we hereunto subscribe our names the fourth day of August in the year one thousand eight hundred and eighty-four.

(S'g'd) E. M. KNIGHT,
Master Bark E. L. Mayberry.

(S'g'd) GEO. F. ELLIOTT,
Master Wm. Hales.

(S'g'd) DAVID COUTTS,
Master Carpenter.

Received for the above survey and report, the sum of one gold ounce each.

(S'g'd) D. COUTTS.
(S'g'd) G. F. ELLIOTT.
(S'g'd) E. M. KNIGHT.

I certify that the foregoing is a true copy of the original on file at this consulate.

Witness my hand and the official seal of this consulate, this the 11th day of August, 1884.

[Stamp: Consulate of the United States, California.]

(S'g'd) H. M. BRENT,
U. S. Consul.

33 EXHIBIT No. 5, August 5, 1892.

We, the undersigned, at the request of H. M. Brent, Esq., United States counsel at Callao, proceeded on the 21st August, 1894, on board the American ship *Andrew Johnson*, of Thomaston, Maine,

1,938 tons register, now at anchor in this port and of which J. H. Killeran is master, with the object of making a second survey on said vessel.

We found that, as recommended in the previous survey, the vessel had been lightened, having discharged about 900 tons of the cargo, which was deposited in the bark *Prinds Oscar*, the vessel being consequently in a better position for being examined.

After having made a thorough and careful examination of the vessel inside and out we have to report as follows:

In the 'tween-decks we found that some of the knees have been working slightly, and that the scarphs of thick stuff showed signs of having moved, otherwise the vessel presented a remarkably good appearance, sound and strong.

On deck we found that the vessel has strained considerably abreast of the fore, main and mizzen masts, and in the waterways. The spars, rigging and sails are in good order and the vessel particularly well found and kept.

On the outside we found the oakum soft, particularly at the hood ends and butts, which showed signs of the vessel having been working. One plank in the starboard after-hood ends had started and requires refastening. In the starboard forehood ends, above the metal the oakum showed signs of having been started, and apparently water had been entering freely.

Having sounded the pump well at 4 p. m. August 21st, we found 20½ inches of water, and at 8 a. m. on the 22d, 22¼ inches were found, showing that she was making ¼ of an inch per hour.

34 We therefore recommend the following repairs:

That the top side and waterways be hosed and caulked, the main decks caulked from foremast forward. The hood ends carefully overhauled, refastened where necessary and well caulked. The bilge pump put in working order.

Taking into consideration the nature of the cargo, the enormous strain it must bear on a ship of the dimensions of the *Andrew Johnson*, we are unanimously and decidedly of the opinion that at least twelve hundred tons of the cargo be forwarded in another bottom, and that with the above repairs and thus lightened she can proceed on her voyage with safety. This we consider to be in the interest of both the owners of ship and cargo.

It will also be necessary that about 600 tons of the cargo remaining in the *Andrew Johnson* be properly distributed in the 'tween-decks; all of which done we are of opinion that the *Andrew Johnson* can proceed on her voyage.

We have conducted this survey carefully and impartially. In witness whereof, we sign in Callao this 23d day of August, 1884.

(S'g'd) E. M. KNIGHT,
Master B'k E. L. Mayberry.

(S'g'd) F. C. BAILEY,
Master of B'k N. Gibson.

(S'g'd) DAVID COUTTS,
Master Floating Dock.

We have each received one gold ounce for above survey.

(S.) E. M. KNIGHT.
(S.) F. C. BAILEY.
(S.) D. COUTTS.

U. S. CONSULATE, CALLAO, *August* 24, 1884.

A true copy of the original deposited in this consulate.

A. M. BRENT,
U. S. Consul.

35 EXHIBIT No. 6, Aug. 5, 1882.

At the request of George Elster, Esqre., Lloyd's agent, Lima, we, the undersigned, proceeded to board the American ship *Andrew Johnson*, 1,938 tons register, J. H. Kelleran, master, at present lying in Callao bay, to examine said vessel and to ascertain if the repairs ordered in previous surveys had been executed, and whether the vessel were in a condition to proceed with her cargo to its destination; and after a careful and minute investigation, we have to report as follows:

That we find the repairs previously ordered to have been well executed, the top sides having been horsed and caulked, several hood ends refastened, the main deck forward recaulked and two new bilge pumps supplied.

That we find the cargo to be well stowed and carefully distributed in the vessel, thus insuring her steadiness and seaworthiness.

That the vessel is at present making no water.

And we therefore are unanimously of opinion that the *Andrew Johnson* in her present condition is thoroughly competent to carry her cargo to its destination. And we further declare that we have conducted this survey in a conscientious manner.

In witness whereof, we hereunto subscribe our names this tenth day of September, one thousand eight hundred and eighty-four.

E. JOSTE.
F. C. BAILEY,
Master N. Gibson.

DAVID COUTTS,
Master Floating Dock.

Received for the foregoing survey report the sum of one gold ounce each.

E. JOSTE.
D. COUTTS.
F. C. BAILEY.

36 Deposition of Edward E. O'Brien, taken on behalf of libellant, on April 18, 1892, at Portland, Maine, before a United States commissioner.

Q. State your name, age, residence and business.

A. Edward E. O'Brien; sixty-two years; Thomaston, Maine; ship-owner, agent and bank president.

I have been connected with the building of ships since 1856. I was not the builder of the ship *Andrew Johnson*. I was the record owner at the time of her loss. She was built by Edward O'Brien at Thomaston, Maine, in 1864, I think. In the year 1882 I became the sole owner of the ship *Andrew Johnson*. I think Captain Killeran must have joined her in the fall of 1883, as near as I can remember. When the *Andrew Johnson* was sunk, all of her cargo was lost. At the time of the loss of the ship *Andrew Johnson*, she was insured in the Boston Marine Insurance Company for one-half according to the value expressed in the policy. (Policy read by the respondent on trial.) The material portions are as follows:

By the Boston Marine Insurance Company: Edward E. O'Brien, on account of whom it concerns: In case of loss to be paid to Edward E. O'Brien, doth make insurance and cause to be insured, lost or not lost, thirty thousand dollars on ship *Andrew Johnson*, for one year from August 23, 1884, at noon. It shall be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accidents, without prejudice to this insurance. And the said property hereby insured is valued at sixty thousand dollars. Touching the adventures and perils which the said Boston Marine Insurance Company is contented to bear and take upon itself in this voyage, they are of the seas, fire, barratry of the master (unless the insured be an owner of the vessel), and of
37 the mariners, and all other losses and misfortunes which have or shall come to the damage of the said property or any part thereof, to which insurers are liable by the rules and customs of insurance in Boston, subject to the conditions and provisions contained or referred to by clauses of this policy. * * * Dated August 26, 1884.

The freight of the *Andrew Johnson*, at the time of her loss, was not insured. At the time of the loss of the *Andrew Johnson* by collision with the British ship *Thirlmere*, I placed her value at the same as it was valued in the policy, sixty thousand dollars. During the year 1884, and up to the time of her loss, Grace Bros., of Callao, were authorized on the part of the *Andrew Johnson* to make her charter-parties. I was informed of the making of the charter party of the *Andrew Johnson* for this voyage upon which she was lost, previous to the time of loading on board of her the cargo for the voyage.

Q. Did you at any time before the loss of the *Andrew Johnson* learn that a bottomry and respondentia bond had been executed upon the *Andrew Johnson*, her cargo and freight, to defray expenses incurred at Callao while there in distress?

A. I think I did. I am unable to state the time or through what source I heard the same.

Q. Did you learn of it before the vessel left Callao?

A. I couldn't say that I did. I couldn't answer positively either way.

Q. Did you at any time, or in any way, supply any funds to the ship *Andrew Johnson*, or her master, to defray the expenses incurred

by her at Callao while there in distress, or at any time before her loss, or any part of said expenses?

A. I think not.

Q. Did you direct any money to be supplied to the ship *Andrew Johnson* or her master, to defray such expenses, or any part of them?

A. I think not.

Q. Are you not able to answer positively either of the last two questions?

A. I am not.

38 Q. Whether or not, at the time the ship *Andrew Johnson* was at Caleta Buena, or at Iqueque, while loading her cargo for the voyage to Hamburg, or while she was at the port of Callao in distress subsequently, there were means of telegraphic communication between these ports and Thomaston, Maine?

A. I think there was telegraphic communication from Callao at that time.

I was first informed of the loss of the ship *Andrew Johnson* by collision with the British ship *Thirlmere* by a cable from Pernambuco, from Capt. Killeran, when he first reached port after the collision. Capt. Killeran and the crew of the *Andrew Johnson* after they reached Pernambuco were forwarded to Liverpool. I instructed Baring Bros. & Co., the Liverpool house, to take measures to recover damages from the owners of the *Thirlmere*. I had correspondence touching the recovery of these damages from the *Thirlmere* with R. L. Gilchrist & Co., ship brokers at Liverpool, who formerly done the ship's business, and the Boston Marine Insurance Company in Boston, and possibly with Hill, Dickinson & Co., my solicitors at Liverpool. I have no letters or cablegrams. I have searched for them and cannot find any. I presume they are destroyed. I have received from the owners of the ship *Thirlmere*, on account of the loss of the ship *Andrew Johnson* and her freight, through Baring Bros. & Co., the sum of fifty-four hundred and seventeen pounds, two shillings and fourpence, which was the net balance of their account as rendered me. Of this amount fifty-one hundred and seventy-nine pounds, thirteen shillings and sixpence was apportioned as the loss on the ship, and eight hundred and fifty-eight pounds, six shillings and eleven pence as the loss on freight, out of which were sundry charges in Baring Bros. & Co.'s account. The net amount which came to my account with Baring Bros. & Co. was five thousand four hundred and seventeen pounds, ten shil-

39 lings and fourpence. I herewith produce the whole account relating to the matter of the recovery from the owners of the *Thirlmere*, which was rendered me by Baring Bros. & Co. at the termination of the matter. This shows sundry charges paid by them relating to the suit, amounting to £635. I have in addition paid out $1,511.47 for the purpose of getting the crew to the place of trial.

I also produce the account of R. L. Gilchrist & Co., amounting to one hundred and sixty-five pounds, for disbursements advanced by them on account of the same suit.

The Boston Marine Insurance Company received through me from the ship *Thirlmere*, or her owners, in payment for the portion of the *Andrew Johnson* insured by that insurance company, a sum calculated to give them one-half after deducting certain expenses.

The insurance company paid me the sum of $30,000 due on the policy as for a total loss of the ship *Andrew Johnson*, less the sum of $2,825.49, the amount of the premium note, with interest. The insurance company paid me that sum on January 6, 1885.

On April 2, 1886, I remitted to the Boston Marine Insurance Company as the sum due the company from the amount which I had received from the owners of the *Thirlmere* for the loss of the *Andrew Johnson*, $11,456.08. A subsequent adjustment of accounts indicated that a further sum of $35.60 was due the insurance company in the matter, and that sum I remitted to them at some time subsequent to June 28, 1886.

Benjamin Thompson, Esq., proctor for respondent, waives all right to cross-examine.

EDWARD E. O'BRIEN.

40 Deposition of Augustus Sillem, taken by commission upon written interrogatories, on the 18th day of April, 1893, by Francis W. Frigout, at London, commissioner.

My name is Augustus Sillem. I am 72 years of age and upwards. My business residence is at No. 15 Bishopsgate street in the city of London, where I carry on my business as a merchant, being a partner in the firm of Anthony Gibbs & Sons of said address. In February and March, 1885, I carried on my said business as a partner in my said firm.

The members of the firm of Anthony Gibbs & Sons in February and March, 1885, were Henry Hicks Gibbs, Augustus Sillem, Alban George Henry Gibbs, James Charles Hayne and Herbert Cockayne Gibbs, and at that time the members of the firm of Gibbs & Co. at Valparaiso, Chili, were Brice Alan Miller, Thomas Dennison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor.

My firm of Anthony Gibbs & Sons were not the owners of the cargo of nitrate of soda shipped per *Andrew Johnson* at Iquique and Caleta Buena in June and July, 1884, and of that portion of said cargo subsequently transferred from the *Andrew Johnson* to the *Mary J. Leslie;* they were the consignees only; Gibbs & Co., of Valparaiso, were the sole owners of said cargo.

Mr. Hugo Wirtz acted as our agent or representative in Hamburgh upon the receipt of that portion of said cargo which reached Hamburgh on the *Mary J. Leslie*.

My firm doubted their obligation to pay the amount claimed under the bottomry and respondentia bond made by Captain Killeran, and we therefore communicated with our Hamburgh agent, Mr. Wirtz, on the subject and instructed him to obtain legal opinions on the questions upon the facts as we then knew them. The effect of these

opinions was that we were obliged on the facts then known
41 to pay the amount claimed before delivery of the cargo could be obtained. Messrs. Baring Bros. & Co. of this city were acting on behalf of the holders of the bond, and my firm made an arrangement with them under which my firm gave an undertaking in writing to pay whatever sum might be due according to the law of Hamburgh from the cargo, in consideration of which Messrs. Baring agreed to have matters settled here in London, and they telegraphed Messrs. Berenberg, Gossler & Co., their agents in Hamburgh, to withdraw the claim. At the same time my firm authorized Mr. Wirtz to pay the full amount of the freight, namely £1,650. On these arrangements being completed delivery of the cargo was given to Mr. Wirtz. This arrangement was made solely for the purpose of getting delivery of the cargo independently entirely of and without prejudice of the ulterior liability of any other person or persons under said bond. I hand to the commissioner, to be annexed hereto as Exhibit A, a true and exact copy of the undertaking given by my firm to Messrs. Baring Bros. & Co., and I also hand to the commissioner, to be annexed hereto as Exhibit B, a copy of Messrs. Baring Bros. & Co.'s letter acknowledging receipt of said undertaking.

The amount legally due from the cargo of the *Mary J. Leslie* in respect of the bond was finally determined as follows: Messrs. Baring Bros. & Co., representing the holders of the bond, instructed Berenberg, Gossler & Co, of Hamburgh, to appoint a lawyer to act on their behalf, and my firm requested Mr. Wirtz to do the same. The two persons so appointed were to decide as to the liability of the cargo for the payment of the bond *in the first instance in* whole or in part. Messrs. Berenberg, Gossler & Co. appointed Dr. J. Wolffson, and Mr. Wirtz appointed Dr. Otto Stammann. These gentlemen decided that the portion of the cargo sent forward
42 on the *Mary J. Leslie* was liable for the whole of the bond and that the receiver had to pay the whole. The said Dr. I. Wolffson and Dr. Otto Stammann are eminent and leading lawyers at Hamburg.

Messrs. Baring Bros. & Co. were acting as agents for Messrs. Grace Bros. & Co., of Lima, Peru, who had advanced the money under the bond. My firm paid £2,592 7s. 9d. to Messrs. Baring Bros. & Co.; the payment was made in London on the 17th March, 1885.

EXHIBIT A.

15 BISHOPSGATE STREET WITHIN,
LONDON, 11*th February*, 1885.

Messrs. Baring Brothers & Co., 8 Bishopsgate St. Within, E. C.

DEAR SIRS: In consideration of your telegraphing Messrs. J. Berenberg, Gossler & Co., of Hamburg, to withdraw their claim on your behalf in respect of bottomry and respondentia, on the cargo of nitrate of soda to our order, arrived by the British vessel *Mary J. Leslie*, we hereby engage to pay to you whatever proportion of

the said bottomry & respondentia bond, may be found to be legally due from the said cargo, the question to be submitted to Messrs. Waltons, Bubb & Walton and Messrs. William Richards & Son in London, or if it be found to be governed by Hamburg law, by equally competent authorities there to be appointed by your agents and ours.

We are, dear sirs, yours truly,
(Signed) ANT'Y GIBBS & SONS.

43 EXHIBIT B.

8 BISHOPSGATE ST., WITHIN,
LONDON, 11 *February*, 1885.

Messrs. Anthony Gibbs & Sons, 15 Bishopsgate St., Within, E. C.

GENTLEMEN: With reference to your letter of this date we understand your guarantee to be equally binding should the case be decided to be governed by Hamburg law, & shall accordingly telegraph our friends in Hamburg to release the cargo of the *Mary J. Leslie*.

We remain, gentlemen, your ob't servants,
(Signed) BARING BROTHERS & CO.

Deposition of William Richards, on within interrogatories, taken by commission on April 18, 1892, before Francis W. Frigout, at London, commissioner.

My name is William Richards. I am 29 years of age and upwards My business residence is at No. 70 Gracechurch street, London, England. I am a partner in the firm of William Richards & Son, average-adjusters. In the years 1885 and 1886, I followed the occupation of an average-adjuster on the staff of William Richards & Son, but I was not then a partner in said firm.

I have followed my present occupation for twelve years last past, the business of my firm is very extensive, and as a matter of fact we do one of the most extensive businesses as average-adjusters in the city of London, and also in Newcastle-on-Tyne, England.

I have become familiar with the rules regulating the distribution of charges upon the various interests of vessel, cargo and
44 freight in cases where the expenses are incurred at a port of distress. My firm prepared a statement respecting the distribution of the expenses incurred on behalf of the *Andrew Johnson* and her cargo in Callao in 1894.

I did not prepare the statement myself personally. My father (the late William Richards, who died in June, 1886) prepared it and discussed points with me in its adjustment from time to time. I hand to the commissioner to be annexed thereto, as Exhibit C, a summary of said statement. It was prepared from documents furnished by Messrs. Anthony Gibbs & Sons.

Cross-interrogatories:

The statement here produced is made in accordance with the

law and practice in making up general average which prevails in London.

I believe there are differences between the law and practice in making up such statements prevailing in London and that prevailing in the United States.

45 EXHIBIT C.

Total bond						£2,592	7 9
The charges composing the bond appear to apply as follows:							
To ship & cargo jointly				£874	4 2		
To cargo				570	2 7		
Do.				32	0 4		
To ship and owners				1,116	0 8		
				£2,592	7 9		
General average						£874	4 2
Ship valued at				£6,600,	pays	£221	8 1
Cargo do.				18,300,	"	613	17 10
Freight				1,160,	"	38	18 3
				£26,060		£874	4 2
Cargo pays general average				£613	17 10		
Particular charges				570	2 7		
				£1,184	0 5		
Charges relating to damage				32	0 4		
				£1,216	0 9		
General average on ship	£221	8	1				
General average on freight	38	18	3				
Charges to ship and owners	1,116	0	8				
	£1,376	7	0	1,376	7 0		
				£2,592	7 9		
Total claim of Messrs. A. Gibbs & Sons on ship *Andrew Johnson* for proportion of general average & charges to ship & freight paid by Messrs. A. Gibbs & Sons						£1,376	7 0

Duplicate.

Average Adjusters
Members.
Association.

New city chambers,
London, 31st May, 1886.

WILLIAM RICHARDS.

46 Deposition of Octavio Rudolph Schroeder, taken on the within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on June 5, 1893.

My name is Octavio Rudolph Schroeder. I am thirty-six years old. Reside in Hamburg. I am by profession an attorney-at-law, and have practiced said profession since 1879 in Hamburg, Germany.

I am familiar with the law as administered in Hamburg in 1885 in respect to bottomry and respondentia bonds.

In reply to the inquiry as to what was the law as administered in Hamburg in 1885 in respect to the collection and enforcement of bottomry and respondentia bonds, and what were the remedies available to the holders of such bonds, I annex as part of my answer a copy of the General German Commercial Code, which was also in force in the year 1885, and which under title seven, page 153 of the fifth book, from article 680 to 701, gives the information called for.

(A translation of the articles specified by the witness is appended.)

I personally had nothing to do in the matter of the bottomry and respondentia bond made by James H. Killeran, master of the *Andrew Johnson*, bearing date Callao, September 15, 1884, but one of my partners had. I can state that on March 14, 1885, my former partner, Dr. Otto Stammann, in conjunction with the attorney-at-law, Dr. I. Wolffson, gave his legal opinion about a bottomry bond on the cargo of nitrate of soda on the *Andrew Johnson*, brought home per *Mary J. Leslie*, and that the contents of the same are in accordance with our German law.

47 Cross-examination:

I have a thorough knowledge of the English language and am now testifying in the English language.

In my opinion, no law prevailing at Hamburg prohibits parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea the bond shall thereby become null and void. I have not read the bottomry and respondentia bond referred to, but I have read the paper dated 14th March, 1885, addressed to Hugo Wirtz, Esq., and signed by Otto Stammann and I. Woolffson. I concur with the views expressed in the last-named paper in regard to the German law in general.

Deposition of Hermann Stockfleth, taken on within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on June 8, 1893.

My name is Dr. Hermann Stockfleth. I am fifty-four years old, reside in Hamburg and by occupation am a notary public. In February and March, 1885, I had the same occupation.

I had instructions to demand from Hugo Wirtz the payment of a certain bottomry and respondentia bond issued by James H. Killeran, master of the *Andrew Johnson*, dated Callao, September 15, 1884. I have looked at the bond annexed (a copy is set forth in the libel) and can state that it is the bond referred to. I was acting and making such demand for Messrs. John Berenberg, Gossler & Co., bankers in Hamburg. I presented the bottomry and respondentia bond to Mr. Hugo Wirtz on the Hamburg exchange, for payment on February 10, 1885. I received no payment, but Mr. Wirtz declared I must first await instructions, which I shall follow immediately. I know nothing further.

48 Deposition of Hugo Wirtz, taken on within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on August 23, 1893.

My name is Hugo Wirtz. I am forty-six years old. I reside at Hamburg, Germany; am by occupation an agent and broker. I have followed my occupation since 1877 at Hamburg, Germany. I know of the arrival of a consignment of 8,449 bags of nitrate of soda of the *Mary J. Leslie* at Hamburg from Callao in February, 1885. I had to receive, to sell and to deliver said cargo of nitrate of soda for Messrs. Anthony Gibbs & Sons, of London, on instructions received through Messrs. Henry Bath & Son, of London. The *Mary J. Leslie* and her cargo of nitrate of soda arrived at Hamburg on February 5, 1885. The bill of lading was sent to me by Messrs. Henry Bath & Son in London. Demand was made upon me in respect to the payment of a bottomry and respondentia bond affecting, or alleged to affect, the nitrate of soda on the *Mary J. Leslie*. I was requested by Messrs. J. Berenberg, Gossler & Co., of Hamburg, to lift the bottomry bond against payment of £2,599 8s. 9d. This demand seems to have been made verbally, as I did not find anything in writing from said firm amongst my papers. I cannot describe the bond, as I do not recollect its contents. The persons making such demand are bankers in Hamburg and represent Messrs. Baring Bros. & Co. in London. I do not remember whether the demand was repeated, but probably it was. On February 10, 1885, the fifth day after the vessel's arrival, the bond was presented to me by a notary public, to whom I replied that I was without definite instructions from my friends. I was informed by Messrs. Henry Bath & Sons, letter dated London, February 16, 1885, that Messrs. Baring Bros. & Co. had agreed to release the cargo on Messrs. Anthony Gibbs & Sons giving Messrs. Baring Bros. & Co. an
49 undertaking to pay "whatever might be found to be legally due." The matter was submitted on February 23, 1885, to two Hamburg lawyers, namely, to Dr. Wolffson on behalf of Messrs. Baring Bros. & Co. and to Dr. Stammann on behalf of Messrs. Anthony Gibbs & Sons, in order to decide as to the liability of the cargo for the payment of the bond in whole or in part. On March 14, 1885, I received Dr. Stammann's and Dr. Wolffson's award, saying that the cargo nitrate was liable for the whole bottomry amount, which

I forwarded the same day to Messrs. Henry Bath & Son, London, who told me in their reply of March 16, 1885, that in accordance with the award Messrs. Anthony Gibbs & Sons were arranging to pay to Messrs. Baring Bros. & Co. the amount of the bottomry bond. I have not a copy of the above award, which, as above stated, was sent to Messrs. Henry Bath & Son, London. The *Mary J. Leslie* finished discharging on February 27, 1885, and delivered 8,309 bags sound, weighing 2,033,764 pounds German gross. The value of the *Mary J. Leslie's* cargo was on her arrival at Hamburg about 9s. 3d. per hundredweight Liverpool floating conditions.

Deposition of Gustav Edward Nolte, taken on within interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on June 17, 1893.

My name is Gustav Edward Nolte. I am forty-two years old, reside at Hamburg, am by profession attorney-at-law and have practiced such profession at Hamburg since 1874. I am familiar with the law as administered in Hamburg in 1885 in respect to bottomry and respondentia bonds. The holder of a bottomry and respondentia bond has an absolute lien upon the vessel, her cargo and her freight, all of which and each for itself are liable for the whole amount, provided it is not especially stipulated that only the vessel or the cargo or the freight are to be liable. The holder of the bond, if he is not paid, can sell the vessel or her cargo at public auction, or can attach the freight to make himself paid. The laws governing bottomry and respondentia bonds are to be found in articles 680 to 700 inclusive, of the General German Commercial Code. I had nothing to do with the bottomry and respondentia bond made by James H. Killeran, master of the *Andrew Johnson*, bearing date Callao, September 15, 1884. I know that my former senior partner, Dr. Otto Stammann, in conjunction with Dr. I. Wolffson, on March 14, 1885, gave a written opinion about the bond referred to, and I can state that this opinion was in every respect in accordance with the Hamburg laws and especially that clause of the said opinion which stated that each part of the cargo of nitrate brought forward by the *Mary J. Leslie* was liable for the full amount of the bottomry bond, provided that the value of such portion of the cargo was not less than the amount of the bottomry bond.

Cross-examination:

I have a thorough knowledge of the English language, and am testifying in the English language. One of the witnesses has already produced a copy of the General German Commercial Code, to which I have referred. I have examined this copy, and can state that it is correct.

The law prevailing at Hamburg does not prevent parties to a bottomry and respondentia bond from making an agreement, that if the vessels hypothecated by it be lost by a peril of the sea, the bond shall thereby become wholly null and void.

I have not read the bottomry and respondentia bond in question, but I have read the paper dated Hamburg, March 14, 1885, addressed to Henry Wirts, Esq., and signed by L. Otto Stammann and I. Wolffson, and as I have already stated, I fully concur in the views expressed in the same.

51 Deposition of Isaac Wolffson, taken upon within interrogatories, before Charles H. Burke, at Hamburg, Germany, commissioner, on July 18, 1893.

My name is Isaac Wolffson; I am seventy-six years old; reside at Hamburg, and am by profession an attorney-at-law; I have practiced my profession in Hamburg since 1839. I hold the degree of doctor of law since 1837. I am familiar with the law as administered in Hamburg in 1885 respecting bottomry and respondentia bonds.

As far as I can remember, I was requested by Messrs. I. Berenberg, Gossler & Co., of Hamburg, to give a legal opinion regarding its bottomry and respondentia bond, made by James H. Killeran, master of the *Andrew Johnson*, and I think I conferred at the time with Dr. Otto Stammann. I presume that the bond annexed was submitted to me at the time, and that the fact of the loss of the *Andrew Johnson* was made known to me. I presume that I must also at the time have seen the annexed bill of lading (same is annexed to amended libel).

I annex a translation of the opinion given by me which has been handed to me, and the correctness of which I do not doubt. The opinion given in the same agrees with the laws administered in Hamburg. Analagous cases are not known to me, but the following sections of the General German Commercial Code apply to the case in question, namely, sections 504, 680 and 507 and 634, 692, 699 and 681.

(A translation of the sections specified by the witness is appended.)

Cross-examination:

I have a fair knowledge of the English language. Am having the interrogatories made to me in English, but am testifying in the German language. I have read my answers as written
52 down by the commissioner, and acknowledge them as perfectly correct. Another witness has produced a copy of the General German Commercial Code.

The law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become wholly null and void; moreover, the hypothecation in so far stands void, though not null, as the hypothecated articles have been sunk, however, remains valid to its full extent for the articles saved. I have read both the bottomry and respondentia bond, and the paper dated Hamburg, 14th March,

1885, addressed to Hugo Wirtz, Esq., and signed by L. Otto Stammann and I. Wolffson, and concur in the views expressed in the last-named paper.

HAMBURG, *14th March*, 1885.

Hugo Wirtz. Esq., Messrs. I. Berenberg, Gossler & Co.:

We formulate the question which you, in the names of Messrs. Antony Gibbs & Sons, and Messrs. Baring Brothers & Co., have submitted to our judgment, as follows:

"Whether the portion of the cargo of nitrate of soda of the *Andrew Johnson*, brought home per *Mary J. Leslie*, is liable for the whole amount of the bottomry bond, which was signed in Callao, and whether, consequently, the receiver of this portion of the cargo has to pay the whole of the bottomry bond, provided the value of this portion of the cargo is not less than the amount of the bottomry debt?"

This question we must answer in the affirmative, because, according to the law here, ship, freight and cargo of the *Andrew Johnson*, as well as the portion of the cargo which was transhipped into the *Mary J. Leslie*, are jointly liable for the whole amount raised
53 on bottomry at Callao, and, therefore, the *Andrew Johnson* and her cargo having become a total loss, the holder of the bottomry bond can come upon that portion of the cargo which was shipped by the *Mary J. Leslie* for the whole amount of his claim.

Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent or appear to be lent contingent upon the safety of the *Andrew Johnson*, and becoming due only after her arrival at her port of destination, but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason, that if the bottomry bond were interpreted in this manner, the cargo of the *Mary J. Leslie* would be entirely liberated, after the loss of the *Andrew Johnson* occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested.

Yours truly,

(Signed) L. OTTO STAMMANN.
I. WOLFFSON.

54 Deposition of Johann Otto Stamman, taken on written interrogatories, by commission, before Charles H. Burke, at Hamburg, Germany, commissioner, on August 23, 1893.

My name is Johann Otto Stamman. I am fifty-seven years old, and am at present a Hamburg senator; but formerly an attorney-at-law. I practiced the legal profession from 1858 to 1886 at Hamburg. I hold the degrees of doctor of Roman and canonic law

since 1857. I am familiar with the law as administered in Hamburg in 1885, respecting bottomry and respondentia bonds.

I remember that subsequent to February, 1885, I was requested by Mr. Hugo Wirtz, as agent of Messrs. Anthony Gibbs & Co., of London, to give, in conjunction with Dr. I. Wolffson, an attorney-at-law in Hamburg, who had been requested by Messrs. J. Berenberg, Godsler & Co., agents of Baring Bros., in London, to give an arbitration regarding the liability of the cargo of the *Mary J. Leslie*, for the amount of a certain bottomry bond which was submitted to us, and I do not doubt but that the annexed bottomry bond is identical with the one then submitted to us. The arbitration as requested was given. I do not remember whether the loss of the *Andrew Johnson* was made known to me, as this was not relevant to the contents of our judgment. I do not remember whether I have ever seen the annexed bill of lading (same is annexed to the amended libel), not having been necessary for the giving of the opinion or judgment.

I have no copy of the arbitration given by us, but I have examined a document presented by one of the witnesses and purporting to be a translation of the judgment, and I am convinced that it is in every respect correct. The judgment or opinion it con-
55 tains was, or is, in accord with Hamburg law as administered therein. The General German Commercial Code, articles 504, 507, 634, section 2; 681, 692, 695, 649 are pertinent statutes.

(A translation of the articles specified by the witness is appended.)

I know nothing further material to the issues, and of advantage to the libellants, than that since I have been informed of the matter now at issue, I am of opinion that according to article 778, section 2, of the General German Commercial Code which governs in Hamburg, the decision ought to be in favor of the plaintiff.

Cross-examination:

I have a good knowledge of the English language and am testifying in the same. I have examined the copy of the General German Commercial Code heretofore produced and find the same to be perfectly correct.

The law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become wholly null and void.

I have read the bottomry and respondentia bond and also the paper dated Hamburg, March 14, 1885, and addressed to Hugo Wirtz, and I concur in the views expressed in the last-named paper.

56 *Translation of the Articles of the General German Commercial Code Cited by the Witnesses and of the Articles Referred to Therein.*

Seventh part.

Concerning Bottomry.

Art. 680. Bottomry, in the sense of this code, is a loan transaction concluded by the master as such, by virtue of the rights granted to him in this code, under promise of a premium and under hypothecation of ship, freight and cargo, or of one or more of these objects, in such a manner that the creditor can enforce his claims only to the extent of the hypothecated (bottomried) objects after the arrival of the vessel at the place where the voyage for which the transaction has been concluded shall terminate (bottomry voyage).

Art. 681. Bottomry transactions may only be concluded by the master in the following cases: (1) While the vessel is away from the port of registry, for the purpose of completing the voyage in conformity with articles 497, 507, 509 and 511; (2) during the voyage in the sole interests of the parties concerned in the cargo, for the purpose of preserving and forwarding the same in conformity with articles 504, 511 and 634. In the case of No. 2 the master may take the bottomry on the cargo alone; in all other cases he may take bottomry for the ship or the freight alone; but for the cargo only together with ship and freight.

When a bottomry bond is given on the ship without naming the freight, the latter is not considered as included. When, however, a bottomry bond on ship and cargo is given, freight is considered to be included in the same. A bottomry bond on the freight is admissible as long as the latter is exposed to any sea risk. A
57 bottomry bond can likewise be given for the freight, of that part of the voyage which has not yet been commenced.

Art. 682. The amount of the bottomry premium may, without any restriction, be agreed upon by the contracting parties.

In default of an agreement to the contrary, the premium includes the interest likewise.

Art. 683. A bottomry bond shall be executed by the master concerning the bottomry transaction. Should this not have been done, the creditor has the same rights as he would have if the master had entered into a simple credit transaction for the purpose of supplying any of his requirements.

Art. 684. The bottomry lender can demand that the bottomry shall contain—

(1.) The name of the bottomry creditor.

(2.) The amount of the principal of the bottomry debt.

(3.) The amount of the bottomry premium, or the total amount of the sum payable to the creditor.

(4.) The description of the objects hypothecated by the bond.

(5.) The description of the vessel and the master.

(6.) The bottomry voyage.

(7.) The time at which the bottomry debt shall be paid.

(8.) The place where the payment shall be made.

(9.) The designation of the document as bottomry bond, embodied in the document itself, or the declaration that the debt has been contracted as a bottomry debt, or any other declaration sufficiently showing the transaction to be of the nature of bottomry.

(10.) The circumstances which have necessitated the entering into the bottomry transaction.

58 (11.) The date and place where the document has been executed.

(12.) The signature of the master.

Art. 685. Unless the contrary has been agreed upon, the bottomry bond shall, at the demand of the bottomry lender, be executed to the order of the creditor or simply to order. In the latter case the word "order" signifies the order of the bottomry lender.

Art. 686. When the necessity of concluding the transaction has been established previous to the execution of the bottomry bond by a document of the consul of the country, or from the consul authorized to act for the same, or in default of such consul from any court of law or any other competent authority of the place of execution, or, in case neither of these exist, from the officers of the vessel, it shall be considered that the master has been duly authorized to conclude the transaction to the extent in question.

Evidence to the contrary, however, shall be admissible.

Art. 687. The bottomry lender can demand the execution of several copies of the bottomry bond. Should several copies have been issued, the number of such copies has to be stated in each of them.

The bottomry bond is transferable by endorsement, if it has been made out to order. The plea that the master had not been authorized to enter into the transaction at all, or to the extent in question, is admissible also against the holder by endorsement.

Art. 688. Unless an agreement to the contrary has been made in the bottomry bond itself, the bottomry debt is payable at the port of destination of the bottomry voyage and on the eighth day after the arrival of the vessel in that port. From the day when

59 it falls due mercantile interest becomes payable upon the whole bottomry debt, including the premium. The foregoing provision does not apply when the premium has been stipulated by time; the time premium runs, however, until the payment of the principal of the bottomry debt has been effected.

Art. 689. The payment of the bottomry debt when due cannot be refused to the legal holder of even one copy of the bottomry bond. Such payment can only be demanded on return of such copy, on which the customary receipt for the payment is to be attached.

Art. 690. In case several legal holders of any bottomry bond apply for payment, such payment shall be refused; the amount shall, in case it is required to obtain possession of the bottomried objects, be deposited with a court of law, or in any other safe manner; and those holders of any bottomry bond who have applied shall be informed of the course taken and of the reasons for the same.

Should such amount not have been deposited with a court of law, the depositor may cause a public document to be issued respecting his proceedings, and his reasons for the same, and he may deduct the expenses thereby occasioned from the bottomry debt.

Art. 691. The bottomry creditor is not liable to contribute to general or particular average. In case, however, the bottomried objects become, by reason of general or particular average, insufficient for the payment of the bottomry creditor, he shall bear the loss thereby caused.

Art. 692. All the bottomried objects are jointly and severally liable to the bottomry creditor. After the arrival of the vessel at the port of destination of the bottomry voyage, the creditor can
60 apply for an arrest of all bottomried objects even before his claim becomes due.

Art. 693. The master shall care for the safe keeping and preservation of the bottomried objects; he shall not, without urgent reason, commit any act whereby the risk of the bottomry creditor is increased or altered from what he might anticipate when entering into the contract.

If he acts contrary to these provisions he is answerable to the bottomry creditor for the damage thereby arising (art. 479).

Art. 694. When the master has arbitrarily changed the bottomry voyage, or when he has arbitrarily deviated from the proper course, or when, after its termination, he has again exposed the bottomried objects to sea risks without having been compelled to do so in the interests of the creditor, the master is personally answerable to the creditor for the bottomry debt, so far as the latter does not receive his payment out of the bottomried objects unless he proves that the non-payment has not been caused through the change of voyage or through the deviation or through the new sea risk.

Art. 695. The master shall not deliver the bottomried cargo, either entirely or partially before the creditor has been paid or properly secured, otherwise the master is personally answerable to the creditor for the bottomry debt so far as he could, at the time of this delivery, have been paid by the goods so given up.

Until the contrary has been proved it shall be considered that the creditor could have been paid in full.

Art. 696. When in the cases of articles 693, 694, 695, the master has acted by directions from the ship-owner, the provisions of the second and third sections of article 479 shall apply.

61 Art. 697. If the amount of bottomry is not paid when due, the creditor may apply to the proper court to order the sale of the ship and cargo on which bottomry has been taken and also to hand over the bottomried freight.

The action shall be brought, as far as the ship and freight are concerned, against the master or owner; as to the cargo, if before its delivery against the master; after its delivery, against the consignee, so long as it is in his own possession, or in the custody of any person holding it for his account.

The creditor can make no use of his rights to the prejudice of a

third party who has *bona fide* become possessor of the bottomried cargo.

Art. 698. The consignee, to whom it is known on taking any bottomried goods, that they are liable for a bottomry debt, becomes personally answerable to the creditor for the debt to the extent of the value which the goods had at the time of their delivery, so far as the creditor could have been paid out of the goods if the delivery had not taken place.

Art. 699. When the adventure is given up before the commencement of the bottomry voyage, the creditor may demand immediate payment of the bottomry debt at the place at which such bottomry bond has been taken. He must, however, be satisfied with a proportionate reduction of the premium; in fixing such reduction the proportion of the danger sustained to that undertaken shall be principally considered. When the bottomry voyage does not terminate in the port of destination, but in another port, the bottomry debt must be paid in the latter port without deduction from the premium, after the expiration of the stipulated time for payment or, in default of an agreement, after the expiration of eight days (art. 688). Such time of payment to be calculated from the definite abandonment.

62 The articles 689–698 apply likewise to the foregoing cases where the contrary is not enacted by this article.

Art. 700. The application of the provisions of this part is not affected by the master being part owner or sole owner of the vessel or of the cargo, or of both of them, or by his having entered into the bottomry transaction upon special instructions from the parties concerned.

Art. 701. It is reserved to the legislation of the various countries to introduce regulations respecting irregular bottomry transactions, *i. e.*, such as may not have been entered into by the master as such in the cases contemplated by article 681.

Art. 479. This liability of the master exists not only towards the owner, but also towards the charterer, shipper and receiver of cargo, the passengers, crew and those creditors of the vessels whose claims arise out of a credit transaction (art. 497), more especially the bottomry creditor.

The master is not exonerated from liability as regards the other before-mentioned persons by having acted according to instructions of the owner. By such instruction the owner becomes also personally liable if he was acquainted with the position of affairs at the time the instruction was given.

Art. 497. The master is, however, only entitled to contract loans, to make purchases on credit and to conclude similar transactions on credit when they are necessary for the maintenance of the vessel and the completion of the voyage, and only so far as is necessary to supply the actual requirement. He is only at liberty to

63 enter into a bottomry transaction when it is unavoidably requisite for the completion of the voyage, and only so far as is necessary to supply the actual requirement. The validity of the transaction depends neither upon the actual application of the

money, nor upon the prudence of the selection made between various modes of raising money, nor upon the question whether the master had at his disposal the money required, except it should be proved that the third party acted in bad faith.

Art. 504. The master shall take every possible care of the cargo during the voyage in the interest of those concerned therein.

When special measures are required in order to avoid or lessen a loss, it is his duty to protect the interest of those concerned in the cargo as their representative; to take their instructions, if possible, and so far as circumstances admit, to carry the same into effect; otherwise, however, to act according to his own discretion, and generally to take every possible care that those interested in the cargo are speedily informed of such occurrences and of the measures thereby rendered necessary.

He is particularly in such cases authorized to discharge the whole or a portion of the cargo in extreme cases, if on account of imminent deterioration or for other causes a considerable loss cannot be otherwise averted, to sell or hypothecate it for the purpose of providing means for its preservation or further transport; or to reclaim it in case of capture or detention; or, if it shall have been otherwise withdrawn from his charge, to take all extrajudicial and judicial steps for its recovery.

Art. 507. With the exception of the cases stated in art. 504, the master has only the right to hypothecate the cargo, or to dis-
64 pose of portions thereof by sale or conversion, when and in so far as it is necessary for the purpose of prosecuting the voyage.

Art. 508. If the necessity orig-nates in a general average, and if the master has an option of remedies, he shall take that determination which entails the least detriment to the parties interested.

Art. 509. When the case is not one of a general average, the master shall not take a bottomry bond on the cargo, or dispose of portions of the same by sale or conversion unless he cannot provide for his requirements in any other way, or unless the adoption of other measures would cause a disproportionate damage to the owner.

In such cases also he can only hypothecate or take a bottomry bond on the cargo together with ship and freight (art. 681, par. 2). He shall resolve upon taking a bottomry bond in preference to sale, unless a disproportionate damage would be caused thereby to the owner.

Art. 511. The enactments of art. 497 are to be applied with respect to the validity of legal transactions entered into by the master in the cases contemplated by articles 504 and 507–509.

Art. 634. The dissolution of the contract of affreight alters nothing in the obligation of the master to take care of the cargo in the absence of the parties interested, even after the loss of the vessel. The master is, therefore, justified and obliged, and in urgent cases even without previous inquiry, as circumstances may require, either to forward the cargo to the port of destination in another vessel for account of the parties concerned, or to have it stored, or sold, and

in case of its being forwarded or stored, to sell a portion
65 thereof for the purpose of realizing the funds necessary thereto, and to its preservation; or in case of its being forwarded to take a bottomry bond on the whole or part — it.

The master is, however, not obliged to part with the cargo, or to deliver it to another master for the purpose of its being forwarded, unless the distance freight as well as all other claims of the ship-owner, and the contributions due from the cargo for general average, salvage and assistance, and bottomry, have been paid or secured.

The ship-owner is responsible for the fulfilment of the duties devolving upon the master according to the first section of this article, to the extent of the value of the ship, so far as anything has been saved of it, and of the freight.

Art. 778. In cases of general average, the compensation for sacrifice or damage takes, as against the ship's creditor, the place of that which the compensation is to make good.

The same rule applies to the indemnity, which in case of loss or damage to the vessel or of non-payment of freight when goods have been lost or damaged, is due to the ship-owner by the party who has caused the damage by his illegal conduct.

When the compensation or indemnity has been received by the ship-owner, he is personally responsible to the ship's creditors to the extent of the amount received in the same manner as to the creditors of a voyage in case of encashment of the freight.

66 Deposition of Captain James Hovey Killeran, taken before a notary public in and for the county of Erie, in the State of New York, on behalf of the libellants in the above-entitled cause, on the 23d day of March, 1893, and read by the respondent.

James Hovey Killeran, being duly sworn, and cautioned to speak the truth, the whole truth, and nothing but the truth, testified as follows:

Q. Where do you live?

A. In Buffalo.

Q. What is your full name?

A. James Hovey Killeran.

Q. Were you in 1884 the master of the *Andrew Johnson* at the time she loaded her cargo of nitrates at Iquique and Caleta Buena?

A. Yes.

Q. Were you also her captain at the time she sought Callao as a port of refuge?

A. Yes.

Q. Were you also her captain when she was lost through collision with the *Thirlmere*?

A. Yes.

Q. What was, in your opinion, the value of the vessel at the time of her loss?

A. About twelve thousand pounds sterling.

Q. And in your opinion what was her value at the time she entered the harbor of Callao, her port of refuge, before making repairs?

A. In my opinion the ship was worth just as much when she entered the port of Callao as she was at the time of the collision. Most of our expense was incurred in transshipping cargo, and the repairs made at Callao were not of a permanent nature.

Q. Were you examined in this cause before?

A. Yes, in August, 1892, in New York city.

67 United States District Court, Southern District of New York.

BRICE ALLAN MILLER *et al.*
vs.
EDWARD E. O'BRIEN.

Butler, Stillman & Hubbard (Wm. Mynderse) for libellants.
Sidney Chubb for respondent.

This was a libel against the respondent *in personam* to recover moneys which the libellants paid in Germany to redeem their cargo from a bottomry bond executed by the master of the American ship *Andrew Johnson* at Callao, Peru, on September 15, 1884.

The libel avers that the libellants in June and July, 1884, shipped on board said vessel at Iquique bay and at Caleta Buena about 20,000 bags of nitrate of soda, to be transported to Hamburg, Germany; that she sailed from the latter port for Hamburg on July 15 in an unseaworthy condition; that thereafter she began to leak badly, and in distress put into Callao, Peru, on August 4th; that she was obliged for safety to transship 1,200 tons of her cargo on board the British bark *Mary J. Leslie*, to be carried to Hamburg, and that for repairs and transshipment she necessarily incurred an expense of £2,215 5s. 9d., British sterling, which the master was obliged to obtain on bottomry of the ship, freight and cargo, including the 1,200 tons shipped on the *Leslie*; for which sum the master legally executed a bottomry bond to Messrs. Grace Brothers & Co., merchants of Lima, with maritime interest at the rate of 17½
68 per cent., making in all £2,599 8s. 9d.; that the *Leslie* arrived at Hamburg safely, but that the ship *Andrew Johnson* became a total loss on the voyage from Callao; and that the libellants in order to obtain possession of the 1,200 tons of cargo belonging to them were obliged, on March 17, 1885, to pay the whole amount of said bottomry and respondentia bond, and that £1,617 4s. 3d. ($7,870.16) thereof were charges specifically made and incurred by and for the benefit of the said ship *Andrew Johnson* and her freight and the owner thereof; and that demand of the last-named sum had been made upon the respondent and payment refused.

The respondent excepted to the libel (1) in that it does not state the nature of the action; and (2) that it does not show a cause of action against the respondent.

BROWN, *J.*:

The nature of the cause, I think, sufficiently appears in the libel to answer the requirement of the 23d rule in admiralty.

The second exception that no cause of action is stated, goes to the merits of the action. It does not cover any mere informality of statement nor any lack of fullness in detail, or of definiteness and certainty. The objection that there is no averment in the libel that communication was had with the owners of the cargo before executing the bottomry, cannot, therefore, be considered. The general averments that the expense incurred was necessary; that the execution of bottomry was necessary; and that the master "lawfully executed" the bottomry are, I think, sufficient, except on special demurrer or special exception.

The general question presented is whether upon a total loss of the *Andrew Johnson* and her cargo and freight the ship-owner is bound to indemnify the owner of the 1,200 tons of cargo that arrived safely by the *Leslie* for what he paid on the bottomry bond to obtain his goods, so far as the bottomry loan was originally incurred for the benefit of the lost ship and freight. 69

The amount claimed in the libel being only £1,617 4s. 3d. ($7,870.16), it is to be inferred that the residue of nearly £1,000 was the amount of the expense included in the bottomry loan that was apportioned against the cargo, while the former sum was charged against the particular average of the *Andrew Johnson* and her freight to be earned.

Through the total loss of the *Andrew Johnson* and of that part of the cargo that remained on board of her the respondent has already lost everything that he embarked in the adventure.

Upon the general question two points have been discussed by counsel; first, whether under the peculiar terms of the bottomry bond the *Leslie* part of the cargo was upon the utter loss of the other ship chargeable with any lien, and whether consequently the libellants were legally bound to pay anything to obtain possession of the *Leslie's* cargo; second, whether, if they were thus bound, there was any legal right of recourse against the owner of the *Andrew Johnson*, who had suffered a total loss of his own ship and freight.

In the recent case of Force *v.* Providence, &c., Insurance Company (35 Fed. Rep., 767), some consideration was given to the different provisions of bottomry instruments in regard to the risks assumed by the lender and his right to salvage in what might remain after a total loss of the ship. In that case the bottomry instrument was a brief and informal draft; the present is a full and formal instrument of some 15 folios. The construction of the instrument itself is not free from difficulty. It is executed by James H. Killeran, as master of the ship *Andrew Johnson*. It recites in detail the principal facts and continues: "That Grace Brothers & Co. were contented to stand to and bear the risk, hazard and adventure of said advances upon the hull, body or keel of the said vessel *Andrew Johnson*, together with the cargo laden on board as afore-

said, and the freight to be earned—and that the said master
70 doth hypothecate and charge the said vessel and her cargo, including that portion of the cargo transshipped to the *Mary J. Leslie*, and the freight to be earned and become payable in respect of said voyage, upon condition that if the said vessel shall forthwith set sail from Callao—and if the above bounden, James H. Killeran, shall within the next five days after the arrival of the vessel at her final port of destination, and before commencing to discharge, pay to Grace Brothers & Co. the said advances, and the maritime premiums thereon—or, if during the said voyage an utter loss of the said vessel by fire, enemies, pirates, the perils of the sea, or navigation, or any other casualty, shall unavoidably happen, to be sufficiently proved by the said James H. Killeran, then and in either of the said cases this obligation shall be void, or otherwise to be and remain in full force and virtue."

The libellants contend that the words "the said vessel" in the condition of the bond apply equally to both the *Andrew Johnson* and the *Mary J. Leslie*. No doubt it was the expectation of the parties that both vessels alike would sail forthwith from Callao, and deliver their cargoes, but the context scarcely admits of any literal application of the conditions to both vessels alike. It could not have been intended that "the above bounden, James H. Killeran," master of the *Andrew Johnson*, should "within five days after the arrival" of the *Leslie* pay the amount of the bond, if his own vessel arrived safely, though more than five days later, at the same port. On the other hand, it is clear that the cargo transshipped to the *Leslie* was intended to be included in the bottomry.

The final clause declares that in case of an utter loss by perils of the sea the obligation is to be void. There is no saving clause reserving to the lenders in case of such loss "any average that might be secured upon all salvage recoverable" as is usual in such full and formal instruments (Ins. Co. *v.* Gossler, 96 U. S., 645, 646).
71 If such an instrument were construed upon the principles of the common law strictly, and if "the said vessel" were held to mean the *Andrew Johnson* only, the whole instrument would become inoperative on the utter loss of that vessel under the condition that the obligation should in that event be void. Considering, however, that this is a maritime instrument to be constructed liberally in favor of the bottomry lender in support of its apparent or reasonable intention, and having regard to the provisions of nearly all the maritime codes, which gives the lender a right in the salvage though the vessel be lost, irrespective of the special phraseology of the instrument, I think that the obligation "that by the condition is to become void" may be fairly construed as intended to mean only the personal obligation or agreement to pay the loan; leaving the pledge operative upon any salvage recoverable, in the same manner as where the saving clause is embodied in the instrument (Force *v.* Providence Wash. Ins. Co., *supra*).

If the above construction is correct, it would not be material that the words "said vessel" in the preceding paragraph literally meant the *Andrew Johnson* only; for the cargo which was brought safely

by the *Leslie* was a part of the original cargo of the *Andrew Johnson* and being hypothecated by the bottomry instrument, that part of the cargo would continue subject to the bottomry lien, like any salvage from the wreck of the *Johnson*, precisely as if it had been rescued by the *Leslie* from the *Johnson* a few moments before the latter went down in mid-ocean.

Assuming, therefore, that as the libel states "the libellants were bound in law to pay the bond in order to obtain their goods" though the libel does not state that the payment was made under the compulsion of any legal proceedings, the case of Duncan *v.* Benson (1 Exch., 537, 3 Exch., 644), is cited as a direct adjudication that the ship-owner is bound to indemnify the libellants as for money paid for his account. In that case, the ship arrived
72 with her cargo, the owner abandoned the ship and freight, and refused to satisfy the bottomry; he was, nevertheless held liable to indemnify the cargo-owner. In Lloyd *v.* Guibert (L. R., 1 Q. B., 115), on the other hand, under precisely similar circumstance the ship-owner was held not liable; because by the law of France, to which country the ship belonged, the ship-owner was absolved from all liability by abandonment of the ship and freight. By the law of England the ship-owner has no similar right to free himself from liability for the master's engagements by abandonment and in the former case, therefore, the owner was held responsible, as for moneys in effect borrowed by the master from the cargo-owner for the purpose of repairing his ship; precisely as if he had sold a part of the cargo for the same purpose, in which case the owner's liability was not disputed.

Directly contrary to the case of Duncan *v.* Benson was the decision of Taney, Ch. J., in the case of Naylor *v.* Baltzell (Taney's, 55), in which the owner of bottomried cargo, which had been sold in the enforcement of the bottomry bond, sued the owner of an American vessel for non-delivery of his cargo. The question of the extent of the ship-owner's liability was then fully considered and held to be limited to the value of the ship and freight that comes to the ship-owner's hands, was held that the master had no authority to bind the owner beyond that limit; and that he could not by a pledge of the cargo indirectly extend the ship-owner's personal responsibility. "The justice and sound policy," says Taney, chief justice, "of the rule which restricts the power of the master over the property and fortune of his owner, to the value of the ship intrusted to his command and the freight she may earn, is proved by its adoption by every commercial nation in Europe; and we should be very unwilling to establish a contrary principle in this country, unless very clear and decisive authorities compelled us to the decision. For it would place the American ship-owner in a far worse
73 condition than his European rival, and compel him to hazard his whole fortune, however large, upon every distant voyage made by one of his ships."

Since that decision was rendered, the act of 1851 (Rev. Stat. § 4283), applicable to at least all cases of loss and damage, and the recent act of June 26, 1884 (23 St. at L., p. 57, ch. 12, § 18), extend-

ing the same exemption to all debts and liabilities generally, save for seamen's wages, have confirmed that adjudication. These acts were designed to bring the law of this country into harmony with the maritime law of most other countries in respect to the limitation of the liabilities of ship-owners arising from the navigation of their vessels and the acts of masters, whether growing out of contract or tort (Norwich Co. *v.* Wright, 13 Wall., 104, 119, 121).

It is immaterial which law be looked to as the law of the contract in this case, whether the law of this country as that of the ship's home, the law of Peru, where the contract was made; or that of Hamburg, where it was to be performed; since the law of all three on this point is now in substantial accord (2 Des Jardins Droit Com. Mar., §§ 280, 282; Force *vs.* Providence, *supra*). By neither is the ship-owner answerable after the utter loss of ship and freight, unless he is chargeable with some personal privity or fault; and that is not here alleged.

The exception to the libel on the merits is, therefore sustained.

June 6, 1888.

74 United States District Court, Southern District of New York.

BRICE ALLAN MILLER and Others, Libellants,
vs.
EDWARD E. O'BRIEN, Respondent.

In admiralty—Bottomry bond.

Butler, Stillman & Hubbard and Mr. Mynderse, for libellants.
Sidney Chubb, for respondents.

BROWN, *J.*:

The above libel was filed against the respondent *in personam* as owner of the American ship *Andrew Johnson*, to recover £1,617 4s. 3d., the defendant's alleged *pro rata* share of certain moneys which the libellants were compelled to pay at Hamburg, Germany, in order to redeem their cargo from a bottomry bond executed by the master at Callao, Peru, on September 15, 1884.

Most of the facts are stated in the decision upon the argument of exceptions to the libel (35 Fed. Rep., 779). It was there held that the bond remained a valid bottomry lien upon the 1,200 tons of nitrates which had been transshipped from the *Andrew Johnson* to the *Mary J. Leslie*, and which reached safely the port of Hamburg, although the *Andrew Johnson*, to whose cargo all the nitrates had formerly belonged, was lost at sea by collision. The exceptions to
the libel were, however, sustained, on the ground that under
75 the acts limiting the liability of ship-owners, the defendant was not further responsible after the total loss of his vessel—her total loss being alleged in the libel. The loss of the *Andrew Johnson* resulted, however, from collision with the ship *Thirlmere*, through the fault of the latter vessel; and the respondent subsequently recovered from the owners of the *Thirlmere* in England

damages for the loss of the *Andrew Johnson* to the amount of £5,179 13s. 6d., and £858 6s. 11d., for loss of freight; the value of the ship having been fixed at £10,000. These facts were alleged in the amended libel and established by the evidence.

On the arrival of the *Leslie* at Hamburg, it was agreed between the representatives of the bottomry claimant and the owners of the cargo that in consideration of the delivery and release of the cargo from the bottomry, the owners of the cargo should pay "whatever proportion of the said bottomry and respondentia bond may be found to be legally due from the said cargo; the question to be submitted" to certain legal counsel as arbitrators; and the cargo was thereupon delivered. Its value was upwards of three times the whole amount of the bond; and the arbitrators having subsequently decided that the cargo was legally subject to the lien of the bond, the whole amount of the bond was paid by the libelants, the owners of the cargo. The bond was given for port of refuge expenses and advances at Callao. Upon an average adjustment afterwards made in London, the amount claimed in the libel was computed to be the *pro rata* amount of the advances chargeable upon the ship and freight; and the above libel was filed for the recovery thereof against the owners as moneys paid for their use.

(1.) On careful consideration of the further arguments made in behalf of the respondents, I am not persuaded of any error in the former decision, as to the proper construction of the bottomry
76 bond, or in the conclusion that the cargo that arrived at Hamburg on board of the *Leslie* was bound by the bond, notwithstanding the loss of the *Andrew Johnson*. Even if the *Andrew Johnson* had been an "utter loss," within the language of the bond, that portion of her cargo which had been transhipped on board the *Leslie*, and which arrived safely, was not lost; and that portion was specifically, and by name, hypothecated in the bottomry bond. It seems to me inconceivable that the parties should thus explicitly have embraced this part of the cargo in the bond without intending it to answer for the bottomry loan on safe arrival at Hamburg, even though the *Andrew Johnson* might perish. The ambiguous phraseology of the bond in using the term "the said vessel" should be so construed as to effectuate the obvious intention of the whole instrument, by making the words "the said vessel" include *both vessels*, *i. e.*, by interpreting the singular for the plural, if necessary, *ut res magis valeat quam pereat.*

Besides this, however, it is the general maritime rule, as I understand, that if there be any salvage, or any proceeds of any of the effects covered by bottomry, the bondholder's lien attaches thereto, though the ship be lost (McLaughlin on Shipping, 3d ed., p. 61; Force *vs.* Providence, 35 Fed. R., 767, 771, and authorities there cited). In full instruments of bottomry like the present an express clause to that effect is often, perhaps usually inserted. The Code of Spain (art. 734), like those of France, Italy and the Netherlands, provides that "in case of shipwreck the amount chargeable for the repayment of the loan on bottomry is reduced to the product of what is saved, less the expense of salvage." The South American

codes are mainly a reproduction of those of Spain; and that of Peru probably has a similar provision. There is no evidence before me on that point, nor have I that code at hand. But so general is this provision, and so wholly is it in accord with the nature and object of bottomry that I cannot help considering it, under the gen-
77 eral maritime law, to be virtually a part of the bond by implication, and not necessary to be expressly reserved in the bond. Such is the rule laid down by Emerigon, Cont. a la Grosse, ch. 11, sec. 2, and this seems to be approved as the general maritime rule in Insurance Co. *vs.* Gossler, 96 U. S., 645, 652, 653, 655, in which the court, per Clifford, justice, states the general law as follows:

"Where the bond covers the cargo as well as the vessel, the lender, *unless the condition is otherwise*, is entitled to be paid even if the ship is lost, if enough of the cargo arrives in safety to pay the bottomry loan; the rule being that a maritime lien of the lender attaches to the entire property covered by the bond, or to all that part of it which arrives at the port of destination in safety."

See Appleton *vs.* Crowningshield, 3 Mass., 464; 8 do., 340.

(2.) It now appears that the respondent has recovered upwards of $30,000 for the loss of the *Andrew Johnson* through the negligence of the *Thirlmere*. These proceeds in the respondent's hands stand as the direct product and representative of the ship; so that the *Andrew Johnson*, even if the words "the said vessel" be held to refer to her only, has not become an "utter loss" within the condition of the bond, or within the presumed intention of the parties. The limited-liability acts, for the same reason, are not available to the owner as a defense, because he must surrender those proceeds as a part of his "interest in the vessel" in order to become entitled to the limitation of liability. Such proceeds have no resemblance to insurance moneys recovered after such a loss; for insurance moneys are held not to stand as a substitute for the ship, because they arise out of an independent, personal contract for indemnity; a contract wholly collateral to the ship, and not constituting any interest in the ship (*City of Norwich*, 118 U.S., 468, 494; 6 Sup.Ct., 1150). The damages recovered for the negligent destruction of the ship
78 are precisely opposite. The right of property in the ship and the right to damages are identical; the latter is founded directly and exclusively upon the former, and is its necessary legal attendant.

That such damages are to be treated as a substitute for the ship, is a rule often applied in cases of mutual fault, upon a total loss of one of the vessels and her cargo. The vessel that survives is not required to pay the whole loss of the other's cargo in addition to one-half the value of the other vessel lost; but the sum recoverable by the latter is treated as a fund representing the lost ship, and as such chargeable with half the loss on her own cargo. This is enforced notwithstanding the fact that the statute makes "the interest of the owner *in the ship and pending freight*" at the *close of the voyage*, the limit of his liability. For his interest in the ship still remains

in the form of a demand against the other vessel for half damages, for which he must account. It is the same with a bottomry bond, for this conveys, in pledge, all the owner's interest in his ship, and under the bond and under the statute alike the transfer of his interest in the vessel includes, by necessary implication, the fund recoverable, as the representative of the ship, for her tortious destruction.

I find, therefore, that the bond was a legal lien upon that part of the cargo which arrived in Hamburg, and which was worth more than the amount of the bond. The libellants, having necessarily paid the bottomry loan in full, in order to obtain possession of the cargo, are entitled to be reimbursed so much, as upon a proper adjustment, was chargeable to the respondent as owner of the ship and freight. The rules of general average being somewhat different in this country from those of England, if the parties are dissatisfied with the adjustment made in London, a reference may be taken to ascertain the proper amount according to our law, there being
79 no evidence that any different law is applicable.

Decree accordingly, with costs.

New York, February 5, 1894.

At a stated term of the district court of the United States for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 12th day of April, 1894.

Present: Hon. Addison Brown, district judge.

BRICE ALAN MILLER and Others, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

This cause having come on for hearing upon the depositions, proofs and arguments of the respective parties, it is now, after due consideration,

Ordered, adjudged and decreed by the court that Brice Alan Miller, Thomas Dennison Comber, John Manley Lowe, John Isdaile Smail and Alfred Nailor, libellants herein, recover against the respondent Edward E. O'Brien, so much of the moneys paid by them in satisfying the bottomry and respondentia bond referred to in the libel as upon a proper adjustment is properly chargeable to the said Edward E. O'Brien, as owner of the ship *Andrew Johnson*, and her freight; and it is further—

80 Ordered, that it be referred to William A. Walker, Esq., as special commissioner to ascertain and compute such amount as these libellants are entitled to recover as aforesaid, and that he report thereon to this court with all convenient speed.

ADDISON BROWN.

(Endorsed:) Interlocutory decree. Filed April 12, 1894.

United States District Court, Southern District of New York.

BRICE ALAN MILLER *et al.*, Libellants,
vs.
EDWARD E. O'BRIEN, Respondent.

SIRS: Please take notice that upon the annexed affidavit, and upon all the papers and proceedings herein, I shall move this honorable court at a stated term thereof to be held at the United States court-rooms in the city of New York on Tuesday, the tenth day of April, 1894, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard for leave to amend the respondent's answer herein as set forth in said affidavit, and for such other and further and different relief in the premises as may be just.

Dated New York, April 6, 1894.

Yours, &c.,

SIDNEY CHUBB,
Proctor for Respondent.

To Messrs. Butler, Stillman & Hubbard, proctors for libellants.

81 U. S. District Court, Southern District of New York.

BRICE ALAN MILLER *et al.*, Libellants,
ag'st
EDWARD E. O'BRIEN, Respondent.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Sidney Chubb, being duly sworn, deposes and says: That he is the proctor for the respondent herein.

That the original libel herein was filed in July, 1887, to which the respondent filed exceptions which were sustained after argument, with leave to the libellants to amend their libel; that the libellants filed an amended libel, to which the respondent filed exceptions, and subsequently and on January 4, 1889, a second amended libel, to which respondent also filed exceptions. That subsequently and on October 1, 1890, the libellants' proctors served on deponent a copy affidavit of Wilhelmus Mynderse, and a notice of motion for leave to amend the sixth article of their second amended libel, by setting up the recovery by the respondent in an English court of admiralty for damages for the loss of his ship *Andrew Johnson* against the ship *Thirlmere* and owners. That the said affidavit was verified on October 1, 1890, and contained this statement: "The information respecting the circumstances attending the loss of the *Andrew Johnson* first came to deponent in July, 1890."

82 That libellants' said motion came on to be heard on Tuesday, October 21, 1890, before the district judge, who, after hearing deponent in opposition thereto, granted the same, and on October 24th an order allowing the libellants to amend their libel as prayed was signed by him and entered.

That thereafter and on October 28, 1890, the libellants filed their

third amended libel, to which the respondent filed verified exceptions and an answer.

That prior to the trial of this cause upon the merits deponent served upon libellants' proctors a notice to produce, of which the following is a copy: "Please take notice that you are hereby required to produce upon the trial of this cause a certain letter from Messrs. Walton, Bubb & Johnson, solicitors, of London, England, to Messrs. Anthony Gibbs & Sons, of London, bearing date London, 14th December, 1885; also a certain letter from the said Walton, Bubb & Johnson to Messrs. Butler, Stillman & Hubbard, of New York, instructing said last-named firm to bring suit in the United States for the claim set up in the libels herein."

That the libellants' advocate, Mr. Mynderse, before the trial showed deponent the second letter called for in the foregoing notice to produce, from which the following is an extract:

"They now claim under Benson *v.* Duncan, 18 Law Journal, Exchequer 169, that owner of the *Andrew Johnson* shall repay to them such part of the amount of the bond as was composed of charges properly falling on ship," &c., &c.

Mr. Mynderse also then stated to deponent that he did not have (or did not find among his papers) any paper answering the description of the letter first called for in said notice to produce.

That hereto annexed and marked Exhibit A is a true copy of said letter.

That when this cause was called for trial before the district judge on November 22, 1893, the libellants' advocate opened by
83 making a statement of the allegations of the libel, whereupon deponent read from the exceptions and answer filed by the respondent the exceptions therein contained, and the district judge overruled the first and third of said exceptions, and reserved the second of said exceptions until the whole evidence should be submitted, to which rulings deponent then excepted, and thereupon deponent moved for leave to amend the respondent's answer by setting up two separate and additional defenses—first, as to so much of the libellants' claim as arises out of the limited liability proceedings in the English court as to the *Thirlmere*, the defense of laches on the part of the libellants in not sooner bringing that matter before this court; second, as to the same portion of their claim, the claim of *res adjudicata* because passed on by the English court. The court thereupon denied each of said motions, and deponent excepted thereto.

That the deponent's object in serving the aforesaid notice to produce was to offer the letters therein described as evidence in support of the said two additional defenses proposed to be set up by him, and the stenographer's minutes of the trial contain the following:

"The COURT: I overrule the motion to amend as to *res adjudicata*, there having been no notice of any such motion."

That the reason why deponent did not set up in the respondent's answer to said third amended libel said additional defense was that

deponent was then of the opinion that his client was entitled to judgment on the defenses then set up, and that deponent was then advised that the presentation and rejection by the English admiralty court of the libellants' claim, founded on their payment of the bottomry bond, did not, according to the law of England, amount to an adjudication thereon, for the reason that the said English court of admiralty was without jurisdiction thereof; that deponent is now advised that the said admiralty court had in
84 fact jurisdiction of libellants' said claim. Moreover, it appears from testimony taken herein by the libellants, subsequent to the filing of respondent's said answer and exceptions, that the respondent had insurance on said ship and would have been entitled to receive from his underwriters half of whatever decree the libellants may be entitled to herein, had the same been secured with reasonable diligence, but that respondent has now lost said recourse by reason of the bar of the statute of limitations.

Wherefore, deponent prays leave to amend the said exceptions and answer of the respondent by setting up the aforesaid two additional defenses of laches on the part of the libellants and of *res adjudicata*.

SIDNEY CHUBB.

Sworn to before me this 6th day of April, 1894.

SAM'L BLATCHFORD,

[SEAL.] *A Commissioner of the United States Circuit Court for the Southern District of New York.*

EXHIBIT A.

LONDON, 14 *Dec'r*, 1885.

Andrew Johnson.

DEAR SIRS: The position of this matter is as follows: In consequence of the amount borrowed on bottomry not having been apportioned between the cargo remaining on board the *Andrew Johnson* and the cargo transhipped to the *Mary C. Leslie*, each of these portions of cargo became charged with the whole amount of the bond as between the owners of cargo and the bondholders, and accordingly, although the *Andrew Johnson* was lost, the bondholders recovered payment of the whole amount of their bond from the portion of cargo on board the *Mary J. Leslie* which arrived.
85 The advance on bottomry was not very judiciously arranged in this respect or this result would not have ensued.

It would have been easy and far preferable to have made some rough apportionment of the amount borrowed between the *Andrew Johnson* and the cargo remaining on board her, and the cargo transshipped to the *Mary J. Leslie*, and to have given separate bonds for the proportions attaching to each, such a course would not have complicated matters with the underwriters in any way as they had no concern with bonds, but only with the items of the

expenditure to meet which the bond was given. So far as to the position with regard to the bond.

Next as to the collision. The *Andrew Johnson* was you are aware was run down by the *Thirlmere*, which vessel was held to blame for the collision, and paid into court to answer all claims the sum of £13,685–7–2, which amount had to be divided by the court among the parties who had suffered loss by the collision.

Now, in one sense the only loss suffered by you as the owners of the cargo on board the *Andrew Johnson*, and *prima facie* you were entitled to claim by that loss, and for nothing else, and the ship-owner entitled to claim for the value of the vessel, but owing to the form of the bond the loss of the *Andrew Johnson* caused the whole amount of bond to fall upon the cargo per *Mary J. Leslie*, and therefore the indirect result of the collision was not only that you lost the cargo on board the *Andrew Johnson*, but also that the cargo on board the *Mary J. Leslie*, a sum of money which would not have fallen upon it if the *Andrew Johnson* had safely arrived. If the *Andrew Johnson* had arrived, the ship and freight would have been liable in the first instance for the bond and the cargo would only have had to contribute its share of general average and charges, the ship-owners bearing the whole of the charges incurred for the ship and the ship's share of general average. Indirectly, there-
86 fore, you sustained a much larger loss by the collision, while on the other hand the ship-owner escaped liability to pay his share of the bottomry bond, which would have become due from him if his vessel had arrived. Accordingly, it is obviously unfair that the amount paid into court by the *Thirlmere* should be divided between the owners of the *Andrew Johnson* and yourselves simply in proportion to the value of the *Andrew Johnson* and of the cargo on board her, for the value of the vessel depended to a great extent on the repairs which had been done to her, the cost of these repairs were included in the bottomry bond which had really been paid by you, and not by the ship. Accordingly, although the point was a very novel one, we contended before the registrar and merchants of the admiralty court, that the fund ought to be distributed equitably—that is to say, that the ship's share of the bottomry bond which you had been obliged to pay out of the cargo of the *Mary J. Leslie* by reason of the loss of the *Andrew Johnson*, and which the ship-owner had thus been saved from paying, should be deducted from the ship's claim and added to your own. We did not entertain any very great hope that we should succeed in this contention, because as against the owners of the *Thirlmere* who had nothing whatever to do with the bond, the only direct loss from the collision for which they were liable was the loss of the vessel and the loss of the cargo on board her.

Accordingly, we were not surprised that the registrar & merchants reported against the claim and simply allow you to participate in the fund in court in proportion to the value of the cargo on board the *Andrew Johnson*, giving the ship-owner the benefit in the increased value of his vessel, of the repairs which he had not, but you had paid for. There is a right of appeal from this decision,

but, although all the equity of the matter is in favor of our contention, we think it extremely doubtful whether the decision would be reversed as matter of law and we do not see our way to advise you to appeal.

87 The figures as they at present stand are as follows: The claim of the *Andrew Johnson* and of her master and crew has been allowed at £8,862—your claim for cargo on board at £10,000. The amount in court, including interest, is about £14,000, and this sum will be divided between you and the owners of the *Andrew Johnson* in proportion to these figures.

There remains the question as to your claim against your underwriters on the cargo. For the reason already explained, you have to pay in respect of the *Mary J. Leslie* cargo, the whole of the bond, which includes a large amount particular average on ship and of special charges on ship, it also includes ship's contributions to general average. All these charges the ship-owner has escaped by the loss of his vessel. You therefore have been compelled to pay under the bond an amount for which apart from the bond, cargo would not have been liable.

It is clear law, established by a number of decisions, that in such circumstances you can recover nothing from the underwriters of cargo in respect of the excess or extra liability thus thrown on cargo, in other words you can recover no more than if the vessel and cargo had safely arrived and the bond had been paid off by the ship-owner. In that case cargo would have had to pay only its proper proportion of general average, &c., and your claim on the policies will, therefore, be confined to the insured value of the cargo on board the *Andrew Johnson* less the amount which you will receive out of court in the collision cause and to so much of the disbursement account for which the bond was given as would in the ordinary way be apportioned to the cargo; to the amount so apportioned you are probably entitled to add the bottomry premiums on that amount.

We should strongly advise that in future cases of the sort when cargo comes on by more than one vessel, the amount borrowed should be apportioned as we have suggested and secured by two distinct bonds, or at all events that the bond should not be

88 so worded as that the arrival of either vessel gives a right to the whole amount even if the other vessel is lost, this would be to your benefit, but it would not alter your position with your underwriters on cargo.

We should add that for the amount which you have had to pay under the bond in excess of cargo's true share of the average expenses, you have a right of action against the owner of the *Andrew Johnson*, such at least would be the case by our law and we believe that the law of the States is the same.

Yours truly,

(Signed) WALTONS, BUBB & JOHNSON.

Messrs. Anthony Gibbs & Sons, Bishopsgate street, E. C.

(Endorsed:) Affidavit & notice of motion. Filed April 12, 1894.

At a special term of the district court of the United States for the southern district of New York, held at the U. S. court-rooms in the city of New York, on the 10th day of April, 1894.

Present: Hon. Addison Brown, district judge.

BRICE ALAN MILLER *et al.*, Libellants,
vs.
EDWARD E. O'BRIEN, Respondent.

A motion made by the respondent upon the affidavit of Sidney Chubb, verified on the sixth day of April, 1894, and upon
89 all the papers and proceedings herein, for leave to amend his answer to the third amended libel, by setting up the two additional defenses set forth in said affidavit, having come on to be heard, now, on reading and filing the said affidavit of Sidney Chubb, with the Exhibit A thereto annexed, and after hearing Sidney Chubb, Esq., advocate for the respondent in support of said motion, and Wilhelmus Mynderse, Esq., advocate for the libellants in opposition thereto, and due deliberation being had in the premises, it is

Ordered, that the said motion be, and it hereby is in all things denied.

ADDISON BROWN.

(Endorsed:) Order. Filed April 19, 1894.

U. S. District Court, Southern District of New York.

BRICE ALAN MILLER
vs.
EDWARD E. O'BRIEN.

The report made by William A. Walker as commissioner herein, is not to be printed or copied, but is to be transmitted to the circuit court of appeals, and is to be used there upon the argument of the appeal herein in its present shape, so far as either party to the appeal desires to refer to same.

New York, August 17, 1894.

BUTLER, STILLMAN & HUBBARD,
For Libellants.
GEO. A. BLACK, *Proc. Resp't.*

90 District Court of the United States for the Southern District of New York.

BRICE ALAN MILLER and Others, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

Exceptions Filed by the Libellants to the Report of Commissioner.

The libellants except as follows to the report of William A. Walker, to whom reference was made to assess the amount due to the libellants.

I. The commissioner should have considered the question of interest, and should have reported that the libellants are entitled to interest upon the principal amount due them from the date of payment of the bond, to wit: March 17, 1885.

II. The commissioner should not have included among the general average charges his fees and disbursements for hearing the proofs and making his adjustment and report, but the same, being payable by the libellants, should be treated as a taxable disbursement against the respondent.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

(Endorsed:) Libellants' exceptions to commissioner's report. Filed June 8, 1894.

91 At a stated term of the district court of the United States, held at the United States court-rooms in the city of New York, on the 12th day of July, 1894.

Present: Hon. Addison Brown, district judge.

BRICE ALAN MILLER and Others, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

The commissioner to whom reference was made to ascertain and compute the amount that the libellants Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, are entitled to recover from the respondent Edward E. O'Brien, having made his report and exceptions having been filed to said report, which exceptions have been argued by counsel for the respective parties, it is now, due consideration having been had,

Ordered, adjudged and decreed by the court that Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail and Alfred Naylor, libellants herein, recover against the respondent Edward E. O'Brien, the sum of $6,091.73 with interest thereon, from the 2d day of April, 1886, in the sum of $3,025.56, and their costs as taxed at the sum of $481.65, amounting in all to the sum of $9,598.94, and that the said libellants have judgment therefor against the said respondent; and it is further—

92 Ordered, adjudged and decreed that unless an appeal be taken from this decree and security be given within the time and according to the practice of this court, then that William R. Grace and William M. Ivins, the stipulators for value upon the bond given by the respondent herein, cause the engagements of their stipulation to be performed and satisfied, or show cause within four days after the expiration of said time why judgment should not be entered against them in the amount of their stipulation, and why execution should not issue thereon; and it appearing that the libellants Henry Hucks Gibbs, Augustus Sillen, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs and Herbert Cokayne Gibbs have no interest in said recovery, it is hereby—

Ordered that this action be as to them discontinued, without costs.

ADDISON BROWN.

(Endorsed:) Decree. Filed July 16, 1894.

U. S. District Court, Southern District of New York.

BRICE ALAN MILLER and Others
vs.
EDWARD E. O'BRIEN.

Please take notice that the respondent Edward E. O'Brien appeals to the United States circuit court of appeals for the second
93 circuit from the final decree entered herein on the twelfth day of July, 1894.

Dated July 16, 1894.

GEORGE A. BLACK,
Proctor for Respondent.

To Messrs. Butler, Stillman & Hubbard, proctors for libellant-Samuel H. Lyman, Esq., clerk.

(Endorsed:) Notice of appeal. Filed July 17, 1894.

U. S. Circuit Court of Appeals.

BRICE A. MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

Appellants' Assignments of Error.

1. The district court erred in giving a decree in favor of libellants.

2. The district court erred in not dismissing the libel.

3. The district court erred in allowing interest to libellants.

4. The district court erred in not holding that the libel-
94 lants were barred by the decision of the English admiralty court in the limitation of liability proceedings of the owners of the ship *Thirlmere*.

5. The district court erred in not holding that the limit of libellants' recovery was the proportion that their claim bore to the entire damage caused by sinking the ship *Andrew Johnson*.

6. The district court erred in holding that the bottomry bond was not void by the master's failure to advise owners of cargo before giving it.

7. The district court erred in holding that the master of the ship *Andrew Johnson* had authority to bond the cargo of libellants loaded on the *Mary J. Leslie* by hypothecation thereof, to pay for the expenses of the ship *Andrew Johnson*.

8. The district court erred in holding that the bottomry bond was not avoided by the utter loss of the ship *Andrew Johnson*.

9. The district court erred in not holding that the payment of libellants of the bottomry bond was a voluntary payment of an unfounded and illegal claim.

10. The district court erred in overruling respondent's exceptions to the libel.

11. The district court erred in refusing to allow respondent to introduce new allegations in his answer, and refusing to receive new evidence before final decree.

GEO. A. BLACK,
Proctor for Respondent.

(Endorsed:) Appellant's assignments of error. Filed July 17, 1894.

95 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

BRICE ALAN MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

I, Samuel H. Lyman, clerk of the district court of the United States of America for the southern district of New York, do hereby certify that the foregoing is a correct transcript of the record of the district court in the above-entitled cause made up pursuant to rule No. 4 in admiralty of the United States circuit court of appeals for the second circuit.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, this 8th day of October, in the year of our Lord one thousand eight hundred and ninety-four, and of the Independence of the said United States the one hundred and nineteenth.

[SEAL.] SAM'L H. LYMAN, *Clerk.*

96 U. S. Circuit Court of Appeals for the Second Circuit.

BRICE ALAN MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

Please take notice that upon the trial of the appeal herein I shall offer in evidence the stipulation hereto annexed.

January 26, 1895.

Yours, &c.,
GEO. A. BLACK,
Proctor for Respondent.

To Butler, Stillman & Hubbard, proctors for libellants.

97 U. S. District Court, Southern District of New York.

BRICE ALAN MILLER and Others
against
EDWARD E. O'BRIEN.

It is hereby admitted that Brice Alan Miller and others composing the firm of Gibbs & Company, of Valparaiso, Chile, appeared personally or through their authorized agents, Henry Hucks Gibbs and others, composing the firm of Anthony Gibbs & Sons, of London, England, in a certain proceeding instituted in the high court of justice, admiralty division by James Fisher and others, owners of the Thirlmere against the owners of the ship Andrew Johnson and others to limit their liability, as owners of the Thirlmere for the loss of the ship Andrew Johnson, and her cargo by collision with the Thirlmere, and that in said proceedings, the libellants, Brice Alan Miller and others received the proportion of the value of the ship Thirlmere, which was adjudged to them as owners of the cargo laden on the Andrew Johnson.

This admission may be read and accepted in evidence in this cause in this court or in any other court in which it may be deemed material and relevant, and in which further proofs may be permitted.

Dated New York, July 11, 1894.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.

98 United States Circuit Court of Appeals, Second Circuit.

BRICE ALAN MILLER *et al.*, Libellants and Appellees,
vs.
EDWARD E. O'BRIEN, Respondent and Appellant.

This is an appeal from a final decree of the district court, southern district of New York, entered July 12, 1894, in favor of the libellants against the respondent for $6,091.73 with interest and costs.

LACOMBE, *Circuit Judge:*

In June and July, 1884, the libellants shipped on board the "Andrew Johnson," a ship owned by the respondent, at Iquique bay and Caleta Buena, 19,943 bags of soda, to be transported on said vessel to Hamburg, Germany, and there to be delivered to the order of Anthony Gibbs & Sons, of London. Soon after sailing the "Andrew Johnson" encountered heavy weather and met with disaster, whereupon she put into Callao as a port of refuge. Surveys were held and in accordance with the recommendation of the surveyors she was lightened by the discharge of part of her cargo, repairs were made to the vessel and 1,130 tons of her cargo forwarded to Hamburg by another vessel, the "*Mary J. Leslie*," the shipment being made thereon in the name of J. H. Killeran as master of the "Andrew Johnson." For the necessities incident to the port of refuge, the repairs of his vessel, the discharge, warehousing, reshipment

and stowage of cargo, the master incurred expenses aggregating about £2,212, largely for handling cargo and transshipping
99 cargo, the repairs to the ship not being of a permanent nature. In order to raise funds to meet these expenses the master made a bottomry bond, dated September 15, 1884, which will be hereinafter more specifically set forth, to the firm of Grace Bros. & Co. for the amount of such advances with a bottomry premium of 17½ per cent., making an aggregate obligation of £2,599. 8. 9. For the payment of this bond he bound, obligated and hypothecated the "Andrew Johnson," her boats and apparel, and her cargo, including that portion of the cargo transshipped to the "Mary J. Leslie," and his freight. The portion of cargo transshipped to the "Leslie" and the "Andrew Johnson" with the cargo remaining on her were, respectively, worth several times the amount of the bond.

The two vessels sailed from Callao for Hamburg carrying their respective lots of cargo. The "Andrew Johnson" came into collision with the British ship "Thirlmere" and was sunk in mid-ocean, no part of her apparel or cargo being saved. The "Leslie" arrived in regular course at Hamburg on February 5, 1885. Her cargo was to be received for the consignees by Hugo Wirtz, a broker residing in Hamburg. On February 10th, the representatives of Baring Brothers & Co., of London, acting on behalf of the owners of the bond, demanded payment of it in full from Wirtz, and on February 11th the representatives of the bondholder and of the consignee of cargo entered into an agreement that the claim against the cargo should be withdrawn, in consideration of Anthony Gibbs & Co. engaging to pay whatever proportion of the bond might be found to be legally due from the cargo of the "Leslie," the question to be submitted to certain eminent and leading lawyers of Hamburg. Thereupon the discharge of the cargo was commenced and completed. The precise date when the "Andrew Johnson" and her cargo were lost does not appear in the record, but the fact of such loss was known in Hamburg when the question as to the effect of such loss was considered by the eminent lawyers to whom it was referred. Neither the ship-owner nor the master nor any representative of either was a party to, or informed of, or present
100 at the proceedings had before the Hamburg referees, nor, so far as appears, was there a scintilla of evidence before them, except the bond and the bill of lading, as to the intention of the contracting parties. The conclusion of the Hamburg lawyers is as follows:

"Some doubt might be raised as to whether, according to the wording of the bottomry bond, the money was not lent, or appear to be lent, contingent upon the safety of the *Andrew Johnson*, and becoming due only after her arrival at her port of destination; but becoming null and void in the event of her non-arrival. We are of opinion, however, that this interpretation is not consistent with the real intention of the contracting parties, and that the wording referred to has originated in the not sufficiently careful use and employment of a form of bond which happened to be at hand. This seems the less doubtful to us for this reason that if the bottomry

bond were interpreted in this manner the cargo of the '*Mary J. Leslie*' would be entirely liberated after the loss of the '*Andrew Johnson*' occurred, and would not even bear a portion of the bottomry debt, which nevertheless has arisen out of a case of general average. Manifestly this cannot have been the intention of the parties interested."

The gentlemen who gave this opinion have been examined and they testify that such "opinion agrees with the laws administered in Hamburg," undoubtedly meaning thereby that if the intention of the parties was as they found it, the conclusion they arrived at was correct. Both of them further testified that the law prevailing at Hamburg does not prohibit parties to a bottomry and respondentia bond from making an agreement that if the vessel hypothecated by it be lost by a peril of the sea, the bond shall thereby become void. The provisions of the general German commercial code which have been put evidence in no way conflict with this statement of the expert witnesses as to the parties' power to contract to take the hazard of the vessel's survival.

Upon the announcement of this decision of the Hamburg
101 arbitrators Anthony Gibbs & Sons, for cargo owners, paid to Baring Brothers & Co., for bondholder, the full sum of £2,592 8s. 9d.

The collision by which the "Andrew H. Johnson" and her cargo were sunk was due solely to the fault of the "Thirlmere." The owner of the "Johnson" sued the owners of the "Thirlmere" in the proper English court, in which suit the present libellants, cargo owners, appeared. The owners of the "Thirlmere" limited their liability under the provisions of the British act to £8 per ton, which resulted in a fund insufficient to pay all the losses in full. The result was that the owner of the "Johnson" received £5,179 on account of the loss of his ship, and £858 on account of his freight, and the libellants here the proportion of the value of the "Thirlmere," which was adjudged to them as owners of the cargo laden on the "Andrew Jackson," but the precise sum does not appear in this record.

The expenses incurred in Callao for which the money was borrowed on the bottomry bond were, as has been before stated, in part chargeable to ship and in part to cargo. Having had an adjustment made in London, the libellants who had paid the bottomry bond brought this suit against the owner of the "Johnson" *in personam* to recover the share of such general and special charges in the port of refuge properly falling upon the vessel, which libellants aver they had to pay in Hamburg in order to redeem their cargo on the "Leslie" from the lien of the bond. Readjustment of some of the items having been made by a commissioner, the district court found in favor of the libellants for $6,091.73, with interests and costs.

It is manifest that the libellants cannot maintain this action unless the bond was a valid obligation when the adventure terminated. The master of the "Andrew Johnson" left no debts behind him for work, or supplies obtained by him in the port of refuge. All

persons who furnished such work or supplies were fully paid, any liens they had therefor discharged, and all indebtedness to them fully extinguished. He secured the means thus to clear ship and cargo from all such claims by bor-
102 rowing the money from Grace Bros. & Co. under a contract which he negotiated with them. If Grace Bros. & Co. had furnished this money as an unsecured loan no one would contend that the cargo owner would have the right to intrude himself into the arrangement, volunteer to repay the loan, and then insist that the ship-owner should pay him in whole or in part. It is only upon the theory that by his negotiations with Grace Bros. & Co. the master of the Johnson so pledged the cargo sent by the "Leslie," that when it arrived in Hamburg it was bound to pay the money borrowed or some part of it; that the cargo owner can contend that such payment was one to which Johnson or its owner should contribute. But if the master borrowed the money upon such terms that in the event of the happening of a specified contingency the cargo should be relieved from all obligation to pay, and such contingency happening the cargo owner nevertheless pays the loan, such payment is a voluntary one so far as the ship-owner is concerned, and it does not cease to be voluntary as to him because it is made in consequence of an unwarranted claim of the lender, or in accordance with an arbitration to which the ship-owner is not a party.

The bond was executed in triplicate on September 15, 1884, by the master in the presence of two witness-, and acknowledged before the United States consul in Callao. It is no brief and informal draft or memorandum. Omitting a few immaterial words and clauses, it reads as follows:

"Know all men by these presents that I, James H. Killeran, master mariner, and commander of the ship 'Andrew Johnson,' of Thomas, Maine, of the measurement, &c., now lying in the port of Callao, am held and firmly bound to Messrs. Grace Bros. & Co., of, &c., in the penal sum of * * * £2,212, to be paid to the said Grace Bros. & Co., or any of them, &c.

"For which payment to be well and faithfully made, I bind myself, my heirs, &c., and also the hull, boats, tackle, apparel and furniture of the *said vessel*, and her cargo of nitrate of soda, including about 1,200 tons of nitrate of soda transshipped on board the British bark 'Mary J. Leslie,' of, &c., and the freight to be
103 earned and become payable in respect thereof, firmly by these presents.

"Sealed, &c.

"Dated, &c.

"Whereas, the *said vessel* lately sailed, &c., * * * sprang a leak, * * * bore up to Callao, * * * was duly surveyed, * * * and certain repairs were recommended to be done to enable the *said vessel* to continue the voyage with safety, and also to transship to another vessel about 1,200 tons of the cargo laden on board the aforesaid 'Andrew Johnson,' in order to enable her to proceed on her voyage with perfect safety;

"And, whereas, all necessary repairs and supplies have been made to the *said vessel*, and the said portion of cargo transshipped to the 'Mary J. Leslie' to enable her to prosecute her said voyage, and she is now in a seaworthy condition and ready to proceed to sea, but the said James H. Killeran having unavoidably incurred certain debts for such repairs and other necessary and lawful matters and things relating to his *said vessel* which he is totally unable to defray and make good save and except upon the security of the bottom of his *said vessel* and her cargo and freight, hath been necessitated to raise the sum of * * * £2,212 for the payment of the debts incurred as aforesaid and to enable the *said vessel* to proceed to sea on the said intended voyage and which sum the said master has been unable to obtain on his own credit or that of the owners of the *said vessel* or in any other way than by bottomry and hypothecation of the *said vessel*, her boats, apparel, cargo and freight;

"And whereas, the said Grace Bros. & Co. have, at the request of the above-bounden James H. Killeran, agreed to lend and advance to him the sum of * * * £2,212 * * * for the purpose aforesaid upon his executing this present bond or obligation and hypothecation of the *said vessel*, her boats and apparel and her cargo, including that portion of the cargo transshipped to the 'Mary J. Leslie' and the freight to be earned and become payable in respect of the said voyage, and the said Grace Bros. & Co. are contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the *said vessel* 'Andrew Johnson,' her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid, and the freight to be earned and become payable as aforesaid, and for securing the repayment of the said sum, * * *

104 the loan whereof is hereby acknowledged, he, the said James H. Killeran, doth by these presents mortgage, hypothecate and charge the *said vessel*, her boats, tackle, apparel and furniture, and her cargo, including that portion of the cargo transshipped to the 'Mary J. Leslie,' and the freight to be earned and become payable in respect of the said voyage, unto the said Grace Bros. & Co., their executors, &c.

"Now, the condition of this obligation is such that if the *said vessel* shall forthwith set sail from Callao aforesaid, and without unnecessary delay or deviation proceed on her intended voyage to Hamburg, and if the above-bounden James H. Killeran shall and do within the space of five days next after the arrival of the vessel at her final port of destination, and before commencing to discharge the cargo free of any average whatever at the then current rate of exchange on London, well and truly pay or cause to be paid unto the said Grace Bros. & Co., &c., upon the present obligation the sum of £2,212, &c., being the principal money of this obligation, and the further sum of £387 for the maritime interest or bottomry premium thereon, at the rate of seventeen pounds ten per centum, making together £2,599, &c., &c.

"Or, if during said voyage an utter loss of the *said vessel* by fire, enemies, pirates, the perils of the sea or navigation, or any other

casualty, shall unavoidably happen, &c., &c. then, and in either of the said cases, this obligation shall be void, or otherwise to be and remain in full force and virtue."

It will be observed that this elaborate and carefully worded document sets forth all the essential circumstances under which the contract was made between Grace Bros. & Co. and the master, as fully as the record in this case does. The disaster, the seeking a port of refuge, the survey, the repairs to the ship, the handling of the cargo, the necessity of lightening the "Andrew Johnson" to enable her to complete her voyage, the transshipment of about 1,200 tons of cargo to the "Leslie," the inability of the master to raise the money to pay expenses—all these are fully disclosed by the instrument itself, and the other evidence in the case adds nothing to our information as to the situation existing when the bargain was made. The bond is clearly expressed and free from any ambiguity. The words
105 "said vessel," wherever they are used, from the beginning to the end of the bond, refer grammatically and logically to the "Andrew Johnson," and to her only. To hold that the last paragraph should read "Or if during said voyage an utter loss of *both of said vessels* * * * shall unavoidably happen, &c.," would not be construction, but alteration of its language. It is not the function of the court to make changes in a written instrument which is apparently deliberately agreed upon, and which unambiguously expresses in plain language a definite meaning (Dumont *vs.* U. S., 98 U. S., 142), where there is no suit to reform the instrument, no evidence of mistake, no proof tending to show that words or phrases contained in it are used with special meaning. Interpretation according to intent is not to be resorted to when the document itself suggests no ambiguity, when it covers the whole subject-matter of the contract between the parties, and when there is no proof of any intent contrary to that expressed upon its face.

The arbitrators assumed, wholly without proof, that the contracting parties had carelessly employed some form of bond which happened to be at hand. They and the district court reached the conclusion that the real intention of the parties was that repayment of the money loaned should be contingent upon the safety of either vessel. The only reasons advanced for such a conclusion are that bottomry bonds are to be construed favorably to the lender; that they, the arbitrators and the district judge, find it inconceivable that the parties should have embraced the transshipped cargo in the bond without intending it to answer for the bottomry loan if the "Leslie" arrived safely, although the "Johnson" were lost; and that the cargo on the "Leslie" ought not to wholly escape if the "Johnson" were lost, since a part, at least, of the bottomry debt represented general average which the cargo ought to pay. The answer to all these suggestions is that they are mere inference and assumption, unsupported by proof, as to the intention of an experienced business man in a distant quarter of the globe who has expressed
106 his intention in plain English the other way, and who must, in the absence of proof, be assumed to be intelligent enough to understand the meaning of the words he used, and sufficiently

appreciative of his own business interests to see to it that the contract he made was the best contract he could get. When the firm of Grace Bros. & Co. expressly state in careful phraseology that they lend their money and "are *contented to stand to and bear the risk, hazard and adventure thereof upon the hull, body or keel of the said 'Andrew Johnson,'* her boats, tackle, apparel and furniture, together with the cargo laden on board as aforesaid (the 'Johnson's' cargo is uniformly referred to in the bond as cargo laden on board, the 'Leslie's' as cargo transshipped) and the freight to be earned and become due," it will not do to hold, without proof, that they meant to stand to and bear a very different risk. Moreover, for the risk they took as it is stated in the bond, viz., the loss of their loan if the "Johnson" became an utter loss they charged a premium of 17½ per cent. But if they staked their loan on the safe voyage of either vessel, so that they could lose nothing unless both vessels met with disaster, manifestly their risk was far less, and who in Hamburg or New York can say whether the parties intended to pay a like premium of 17½ per cent. for such a risk? If courts thus, of their own motion and without proof of mistake or of intent reform mercantile contracts as clearly expressed as this, no business man can feel any confidence that his most careful choice of words will ensure a construction of his agreement accordant to his own expressed intention or otherwise than as the court may think such intention was or ought to have been.

We are of opinion, therefore, that the bond became void upon the sinking of the "Andrew Johnson" with her cargo, and not thereafter enforceable against the 1,130 tons transshipped to the "Leslie," and that the payment of the bond by the consignee of that 1,130 tons was voluntary and gave the cargo owner no right to call upon the owner of the "Johnson" for the repayment of any part
107 thereof. The proposition that the 1,130 tons on the "Leslie" is to be treated "like any salvage from the wreck of the 'Johnson,' precisely as if it had been rescued by the 'Leslie' from the 'Johnson' a few moments before the latter went down in mid-ocean," and that it therefore remained subject to the bottomry lien after the "Johnson" went down, is overstrained. In no possible sense was the 1,130 tons salvage of the "cargo laden on board" the "Johnson" on the voyage of that ship from Callao to Hamburg, which was the voyage on whose safe termination the bottomry tender staked his money.

It is not necessary to discuss the question whether a bottomry bond covers salvage when it is a full and formal instrument and contains no saving clause reserving to the lenders, in case of utter loss, any average that might be secured upon all salvage recoverable, a clause which is usual in such full and formal instruments (Ins. Co. *vs.* Gossler, 96 U. S., 645), since there has been no salvage either of cargo or ship in this case. The damages recoverable against the delinquent vessel which sent the "Andrew Johnson" and her entire cargo to the bottom are certainly not salvage. It may be that the bondholder, in the event of an utter loss which made his bond void, would have a direct claim against the offending vessel for damages

caused to him by the destruction of property in which he had an interest superior to the owners, and that when the offending vessel had made restitution in money for such destruction in whole or in part, and the amount thus paid has come to the hands of the owner, the bondholder can sustain an action against him for money had and received (Smith *vs.* Williams, 2 Caine's Cases in Error, 109; Read *vs.* Mutual Ins. Co., 3 Sanford, 54; Watson *vs.* Ins. Co. of N. A., 3 Wash. C. C., 1; Appleton *vs.* Crowninshield, 3 Mass., 448; Same *vs.* Same, 8 Mass., 358; The Empusa, 5 P. D., 6). The bondholder recovers in such a case, however, not upon any theory that his bond survives as an obligation enforceable against the fund, as the representative of the ship. No doubt damages recovered for the tortious act of a colliding vessel are often treated in
108 admiralty as a substitute for the destroyed vessel. But the hazard taken by the bottomry bondholder is the physical survival of the ship, or at most of any salvage from her. When she goes to the bottom with all she holds there is an utter loss within the meaning of the contract of bottomry, and the bond goes down with the vessel. Recovery by the bondholder under such circumstances is, as above stated, either against the offending vessel for destroying the property interest which the bond gave him, or against the person who has without right appropriated his share of the damages. But that is not this case. Libellants are not suing as assignees of the bondholder to recover damages for the destruction of the bond either from the person or thing responsible for such destruction or from the respondent as having received those damages to the use of the bondholder. The whole action is based upon the theory that libellants paid the bond, as an obligation they were bound to pay, and now ask to be repaid the proportion due under the bond from respondent. As the record shows that by the happening of the contingency upon which the loan was hazarded the bond became wholly void, libellants were under no obligation to pay it, and having paid it can claim nothing under it from respondent.

The decree of the district court is reversed with costs of both courts.

(Endorsed:) U. S. circuit court of appeals, second circuit. Brice Alan Miller *et al. vs.* Edward E. O'Brien. Opinion. Lacombe, J. United States circuit court of appeals, second circuit. Filed April 16, 1895. James C. Reed, clerk.

109 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 108, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs,

Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs, libellants and appellees, *versus* Edward E. O'Brien, respondent and appellant, as the same remain of record and on file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 25th day of April, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the said United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

110 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which Edward E. O'Brien is respondent and appellant and Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, Alfred Naylor, Henry Hucks Gibbs, Augustus Sillem, Alban George Henry Gibbs, Charles James Hayne, Vicary Gibbs, and Herbert Cokayne Gibbs are libellants and appellees, which suit was removed into the said circuit court of appeals by virtue of an appeal from the district court of the United States for the southern district of New York, *and* we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed
111 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court as aforesaid the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the seventh day of May, in the year of our Lord one thousand eight hundred and ninety-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

112 [Endorsed:] Supreme Court of the United States, October term, 1894. No. 997. Edward E. O'Brien *vs.* Brice Alan Miller *et al.* Writ of certiorari.

UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

I, James C. Reed, clerk of the United States circuit court of appeals for the second circuit, by virtue of the foregoing writ of cer-

tiorari and in obedience thereto, do hereby certify that the following pages, numbered from 4 to 6, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Brice Alan Miller, Thomas Denison Comber, John Manley Lowe, John Isdaile Smail, and Alfred Naylor, libellants, appellees, against Edward E. O'Brien, respondent, appellant, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eleventh day of May, in the year of our Lord one thousand eight hundred and ninety-five, and of the Independence of the United States the one hundred and nineteenth.

Seal United States Circuit Court of Appeals, Second Circuit.

JAMES C. REED, *Clerk.*

113 United States Circuit Court of Appeals for the Second Judicial Circuit.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL, and ALFRED NAYLOR, Libellants,
against
EDWARD E. O'BRIEN, Respondent.

It is hereby stipulated and agreed by and between the proctors for the respective parties to the above-entitled cause that the record certified from this court and filed in the Supreme Court of the United States with the libellants' petition for a writ of certiorari, together with a copy of the order entered herein May 6th, 1895, and a copy of the order entered herein May 8th, 1895, be taken and deemed as the record returned from this court under said writ, and that the said writ be returned to the Supreme Court of the United States with this stipulation or a duly certified copy thereof and with a copy of said orders attached.

New York, May 9th, 1895.

BUTLER, STILLMAN & HUBBARD,
Proctors for Libellants.
GEO. A. BLACK, *Proctor for Respondent.*

(Endorsed:) Circuit court of appeals. Brice Alan Miller and others, libellants, against Edward E. O'Brien, respondent. Stipulation. Butler, Stillman & Hubbard, proctors for libellants, 54 Wall street, New York city. United States circuit court, second circuit. Filed May 11, 1895. James C. Reed, clerk.

114 At a stated term of the United States circuit court of appeals for the second circuit, held at the court-rooms, in the U. S. post-office building, in the city of New York, on the 6th day of May, 1895.

Present: Hon. William J. Wallace, Hon. E. Henry Lacombe, Hon. Nathaniel Shipman, circuit judges.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, John Isdaile Smail, and Alfred Naylor, Libellants & Appellees,

versus

EDWARD E. O'BRIEN, Respondent & Appellant.

This cause having come on to be heard on the appeal of the respondent herein from a final decree of the district court of the United States, entered July 12th, 1894, and having been argued and submitted and due deliberation having been had, now, on motion of George A. Black, proctor for appellant, it is—

Ordered, adjudged, and decreed that the said decree of said district court be, and the same hereby is, reversed and the libel herein dismissed, with costs of this court and of said district court to the respondent, and that a mandate issue from this court to said district court to enter a decree herein in accordance with this decision.

115 At a stated term of the United States circuit court of appeals for the second circuit, held in the United States court-rooms, in the city of New York, the 8th day of May, 1895.

Present: Hon. William J. Wallace, E. Henry Lacombe, Nathaniel Shipman, circuit judges.

BRICE ALAN MILLER, THOMAS DENISON COMBER, JOHN MANLEY LOWE, JOHN ISDAILE SMAIL, and ALFRED NAYLOR, Libellants,

against

EDWARD E. O'BRIEN, Respondent.

Upon the affidavit of Wilhelmus Mynderse, verified May 7th, 1895, and upon the order to show cause thereon granted, and it being made known to the court that no mandate has in fact yet issued out of this court, it is now, after hearing Wilhelmus Mynderse for the libellants, and no one appearing to oppose—

Ordered that the issuance of any mandate under the order entered herein on the 6th day of May, 1895, be, and that it hereby is, stayed pending the determination of this cause in the Supreme Court of the United States.

116 [Endorsed:] Case No. 15,881. Supreme Court U. S., October term, 1896. Term No., 266. Edward E. O'Brien, app't, *vs.* Brice Alan Miller *et al.* Writ of certiorari and return. Office Supreme Court U. S. Filed May 15, 1895. James H. McKenney, clerk.